IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Petitioners*,

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Docket 1458

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.,
Plaintiffs,

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI, ET AL.,
Defendants.

Docket Entries

Date	Proceedings
1969	
Aug. 4	Complaint—filed.
Aug. 27	Defendant's motion for additional time to answer and plead—filed.
Aug. 27	Order—filed. (Defendant given an additional 30 days to file answer or such other pleadings.) Copies mailed to parties.
Sept. 29	Motion to dismiss (by defendants)—filed. Suggestions in support of motion to dismiss—filed.
Oct. 23	Defendants' answers to questionnaire—filed.
1970	
Jan. 27	Order granting defendants' motion to dismiss; and Judgment of Dismissal—filed. (Ordered that defendants' Motion to Dismiss be, and it is hereby, granted. It is further Ordered and Adjudged that this cause be, and it is hereby, dismissed.) Copies mailed to parties.
Feb. 20	Notice of Appeal—filed. (Copies mailed to parties.)
Feb. 26	Bond for Costs on Appeal—filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

[Title omitted in printing.]

Complaint

(Filed in U. S. District Court August 4, 1969)

Comes now the plaintiffs in the above matter and for their cause of action against the defendants state:

1. This action is brought to recover from the defendants unpaid overtime compensation, and an additional equal amount as liquidated damages, and reasonable counsel fees, under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1069, as amended by Pub. L. 89-601; 80 Stat. 830-832, 837; Title 29, U. S. C., Secs. 201-219 (as amended, Pocket Part, 1969), known as the Fair Labor Standards Act, a law of the United States regulating interstate commerce. Jurisdiction is conferred on this Court by Title 28, U. S. C., Sec. 1337.

2. Defendant Department of Public Health and Welfare is an agency of the State of Missouri, defendants Division of Mental Disease and Division of Health of the State of Missouri are Divisions of the said Department of Public Health and Welfare. Defendant Austin Hill is the Director of the Department of Public Health and Welfare, defendant George A. Ulett, M.D., is the Director of the Division of Mental Disease, defendant L. M. Garner, M.D., is the Acting Director of the Division of Health. These defendants are charged under the law with the power and authority to establish, maintain and control a system of public hospitals within the State of Missouri and pursuant to said power have operated and maintained hospitals in the State of Missouri consisting of, among others; State Hospital No. 1, Fulton, Missouri; State Hospital No. 2, St. Joseph, Missouri; State Hospital No. 3, Nevada, Missouri; State Hospital No. 4, Farmington, Missouri, and

Malcolm Bliss Hospital, St. Louis, Missouri. These defendants operated such hospitals on February 1, 1967 and continue to operate said hospitals to and including the time of the filing of this complaint and said Hospitals are Hospitals within the meaning of Section 203 of the Fair Labor Standards Act as amended on September 23, 1966, Pub. L. 89-601, effective February 1, 1967.

3. Defendant State Board of Training Schools is a Division of the Department of Corrections of the State of Missouri and exists by reasons of Article 4, Sec. 38 of the Constitution of the State of Missouri and has exclusive supervision of the Training School for Girls at Chillicothe, Missouri. Defendant W. E. Sears is Director of the Division of Training Schools and defendants Oren J. Lamb, James L. Coffman, John J. Gillis, James E. Conway, Mrs. Juanita Evans, and Ellis F. Rucker are members of the State Board of Training Schools. These defendants are charged with the power and authority to establish, maintain and control a system of Training Schools within the State of Missouri and pursuant to such power have operated the Training School for Girls, Chillicothe, Missouri. Defendants were operating said educational institution on February 1, 1967 and continue to operate said institution up to and including the time of the filing of this complaint and said Training School is formally and legally an educational institution and school within the meaning of Sec. 203 of the Fair Labor Standards Act as amended on September 23, 1966 by Pub. L. 89-601, effective February 1, 1967.

4. That defendants Austin Hill, George A. Ulett, L. M. Garner, W. E. Sears, Ellis F. Rucker, Oren J. Lamb, James L. Coffman, John J. Gillis, James E. Conway, and Mrs. Juanita Evans are sued both individually and in their official capacities as set forth herein.

5. The plaintiffs are now and at all times pertinent hereto, have been members of the American Federation of

State, County and Municipal Employees' Union, AFL-CIO, affiliated with Missouri State Council 72 of said Union. Said Missouri State Council 72 is now and at all times pertinent hereto, an unincorporated voluntary association, to-wit: a labor organization engaged in representing employees of various departments of the State of Missouri in regard to their wages, hours and working conditions.

6. That the plaintiffs in Group I are employees of the Department of Public Health and Welfare of the State of Missouri and those employees listed as in Group I (A) are employed by the Division of Mental Diseases at the Institutions listed in the caption. That plaintiffs listed in Group I (B) are employees of the Division of Health working at the Ellis Fischel Cancer Hospital in Columbia, Missouri. That plaintiffs listed in Group II of the caption of this pleading are employees of the Division of Training Schools working at the Training School for Girls, Chillicothe, Missouri. That the enterprises and institutions named herein are engaged in the operation of said Schools and Hospitals and plaintiffs bring this action for themselves and for the benefit of other employees similarly situated, such employees constituting a class, the members of which are so numerous as to make it impractical to bring them all before the Court. Plaintiffs represent that they are competent to represent the interest of said class.

7. That plaintiffs named herein and all the other employees of the Division of Mental Diseases, the Division of Health, and the Training School for Girls, Chillicothe, Missouri for whose benefit and in whose behalf this action is brought are now and since the 1st day of February, 1967 have been employees within the meaning of the Fair Labor Standards Act, 29 U.S.C., Sec. 203 (e).

8. The plaintiffs and all the other employees of the enterprises engaged in the operation of said School and Hospitals for whose benefit and in whose behalf this action is brought are entitled to the benefits of the maximum

hours provision of the Fair Labor Act, 29 U.S.C., Sec. 207 (a) (2), which provides *inter alia* as follows:

> No employer shall employ any of his employees . . . for a workweek longer than 44 hours during the first year from the effective date of the Fair Labor Standards amendments of 1966 [February 1, 1967 to and including January 31, 1968], for a workweek longer than 42 hours during the second year from such date [February 1, 1968 to and including January 31, 1968], or for a workweek longer than 40 hours after the expiration of the second year from such date [February 1, 1969, ad finitum], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

9. Since the 1st day of February, 1967, to and including the 31st day of January, 1968, the plaintiffs and all the other employees for whose benefit and whose behalf this action is brought were required to work and did work in excess of 44 hours per week.

10. Since the 1st day of February, 1968, to and including the 31st day of January, 1969, the plaintiffs and all of the other employees for whose benefit and whose behalf this action is brought were required to work and did work in excess of 42 hours per week.

11. Since the 1st day of February, 1969, to and including the 1st day of August, 1969, the plaintiffs and all the other employees for whose benefit and in whose behalf this action is brought were required to work and did work in excess of 40 hours per week.

12. Since the 1st day of February, 1967, and continuing to the present date, the plaintiffs have demanded and continued to demand that they be compensated at a rate not less than one and one-half times the regular rate at which they are employed for the hours they were required to work in excess of 44 hours per week for the period of February 1, 1967, to and including January 31, 1968.

13. Since the 1st day of February, 1968, and continuing to the present date, the plaintiffs have demanded and continued to demand that they be compensated at a rate not less than one and one-half times the regular rate at which they are employed for the hours they were required to work in excess of 42 hours per week for the period February 1, 1968 to and including January 31, 1969.

14. Since the 1st day of February, 1969, and continuing to the present date, the plaintiffs have demanded and continued to demand that they be compensated at a rate not less than one and one-half times the regular rate at which they are employed for the hours they were required to work in excess of 40 hours per week for the period February 1, 1969, to and including August 1, 1969.

15. By reason of the defendants' refusal to comply with the maximum hours provisions of the Fair Labor Standards Act and to compensate the plaintiffs at one and one-half times the regular rate at which they are employed for all hours they were required to work in excess of 44 hours per week for the period of February 1, 1967, to and including January 31, 1968 and for the hours they were required to work in excess of 42 hours per week for the period of February 1, 1968, to and including January 31, 1969, and for the hours they were required to work in excess of 40 hours per week for the period of February 1, 1969 to and including August 1, 1969 as set forth above, the plaintiffs and all of the other employees for whose benefit and whose behalf this action is brought have been injured in the amount of the overtime wages they should have received if not for the defendants' wilful violations of the maximum hours provisions of the Fair Labor Standards Act.

16. In addition to the amounts of unpaid overtime compensation due from defendants to plaintiffs, plaintiffs also claim additional amount equal to the sums due them respectively, as liquidated damages, as provided by Title 29, Sec. 216 (b).

17. By reason of the defendants' wilful and unjustified refusal to pay the overtime due these plaintiffs it has been necessary for them to employ attorneys to prosecute this cause for them and in accordance with Sec. 216 (b), request is therefore and hereby made for reasonable attorney fees, interest, and cost of this action to be assessed against defendants.

18. In compliance with the requirement of Title 29, U.S.C., Sec. 216 (b), there are attached hereto authorizations signed by the plaintiffs, which constitute consents in writing to becoming a party to a suit under said section.

Wherefore, the plaintiffs severally demand judgment for themselves and for all other employees similarly situated for whose benefit and whose behalf this action is brought, for all sums which may be found to be due to each of them for unpaid overtime compensation, and for an additional equal amount as liquidated damages, and for reasonable attorney fees, interest, and the cost of this action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

(Title omitted in printing)

Motion To Dismiss

(Filed in U. S. District Court September 29, 1969)

Comes now the State of Missouri by John C. Danforth, Attorney General of Missouri, solely for the purpose of contesting the jurisdiction of this Court and the defendants named herein and under Rule 12 (b) of the Federal Rules

of Civil Procedure respectfully moves the Court to dismiss this action for the following reasons:

1. The State of Missouri is an indispensable party who must be joined in this action under Rule 19 and whose presence will deprive the Court of jurisdiction in this action.

2. The Court is without jurisdiction to entertain this action because it is in substance and affect against the State of Missouri which has not consented to be sued or waived its immunity from suit and, therefore, this action is proscribed by the Eleventh Amendment of the Constitution of the United States.

3. The complaint fails to state a claim upon which relief can be granted because the relief sought is in fact against the State of Missouri and the named defendants are but nominal parties. The action is designed to reach funds of the State of Missouri as well as control the affirmative official action of the State and its agencies in its political capacity.

Wherefore, the defendant for the foregoing reasons prays that the complaint be dismissed and for such other and further relief as to the Court seems proper in the premises.

JOHN C. DANFORTH
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314 636-7131

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Docket 1458

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Plaintiffs*,

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI, ET AL., *Defendants*.

Order Granting Defendants' Motion To Dismiss: Judgment of Dismissal

(Filed in U. S. District Court January 27, 1970)

This is a suit under the Fair Labor Standards Act, Sections 201-219 of Title 29, United State Code. The plaintiffs state that they are employees of the defendant within the meaning of Section 203(e) of the same title who have worked more than 44 hours a week during the period of February 1, 1967, to January 31, 1968; more than 42 hours during the period of February 1, 1968, to January 31, 1969; and more than 42 hours during the period February 1, 1969; and they accordingly sue for time-and-a-half overtime pay in accordance with § 207(a)(2) of the above title, which overtime pay they state they have continually demanded of defendants, who have failed and refused to pay it. Plaintiffs also request an additional equal amount in liquidated damages.

The federal and state courts have consistently held that actions of this nature against an official or agency of the state in his official capacity are actions against the state itself. *Ford Motor Company* v. *Department of Treasury of the State of Indiana*, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389; *Klekan* v. *Morris*, Mo., 247 S. W. 2d 832; *State ex rel. State Park Board* v. *Tate*, Mo. en banc, 295 S. W. 2d 167; *State ex rel. Eagleton* v. *Hall*, Mo. en banc, 389 S. W. 2d

798. The principle thus recognized is that of sovereign immunity, in accordance with the Eleventh Amendment to the United States Constitution.

In *Maryland* v. *Wirtz*, 292 U. S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020, the United States Supreme Court held that the Fair Labor Standards Act applied to state governments in certain circumstances, but specifically declined to determine whether a suit by an employer of the state against the state government under Section 216(b) was permissible in light of the Eleventh Amendment's recognition of the principle of sovereign immunity.

The question specifically reserved in that case, however, has recently been decided in favor of the principle of sovereign immunity by the United States District Court for the District of Utah in the case of *Briggs* v. *Sagers* (D. Utah) — F. Supp. — (decided July 11, 1969). In that case, as in this one, state welfare department employees sued for overtime compensation.

There is no question of waiver of immunity under the pleadings in this case. Cf. *Parden* v. *Terminal Ry. Co.*, 377 U. S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233.

For the foregoing reasons, it is

Ordered that defendants' motion to dismiss be, and it is hereby, granted. It is further

Ordered and Adjudged that this cause be, and it is hereby, dismissed.

WILLIAM H. BECKER
Chief Judge

Kansas City, Missouri
Date: .....

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

IN THE

Supreme Court of the United States

October Term, 1971

FEB 9 1972
E. ROBERT SEAVER, CLERK

No. 71-1021

GROUP I—EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI

A. DIVISION OF MENTAL DISEASES:

1. STATE HOSPITAL NO. 1, FULTON, MISSOURI
Garfield Branch, Robert M. Miller, Melvin Trammell, Victor J. R. Weiser,

2. STATE HOSPITAL NO. 2, ST. JOSEPH, MISSOURI
Juanita Abberry, Myrtle Beckner, Agnes Chesser, June Coates, Diana G. Coles, James E. Cole, Carol Combs, Norma Dilde, Elsie D. Donahoe, Ethel Edwards, Pauline M. Emerson, Roxanne S. Hayes, Arthur Kempf, Paul M. Kerder, Jack L. Lisle, Nancy L. Lisle, Thomas W. Lovewell, Margaret Maxwell, Clarence Meade, Claud C. McClain, Thelma Noland, Maxine O'Banion, Theresa Ross, Clarence T. Wade, Wanda Jean Weiser, Mildred Woods,

3. STATE HOSPITAL NO. 3, NEVADA, MISSOURI
Billy D. Barnes, Lynwood W. Clark, Florence Carlson, Lusi Carlson, Mary T. Mixner, George S. Nicas, Richard E. Place, John E. Strack,

4. STATE HOSPITAL NO. 4, FARMINGTON, MISSOURI
Raymond Edgars, Paul Steward, Harold Umfleet, Bobby Watkins,

5. MALCOLM BLISS HOSPITAL, ST. LOUIS, MISSOURI
James A. Ballard, Hardy Ball,

B. DIVISION OF HEALTH:
ELLIS FISCHEL STATE CANCER HOSPITAL, COLUMBIA, MISSOURI
Ruth E. Harris, Betty J. Heisler, Edith J. Sims

GROUP II—EMPLOYEES OF STATE BOARD OF TRAINING SCHOOLS, CHILLICOTHE, MISSOURI
Letha O. Briscoe,

Petitioners
For Themselves and Others Similarly Situated,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI,
AUSTIN HILL, Director, Department of Public Health & Welfare, State of Missouri,
DIVISION OF MENTAL DISEASE, State of Missouri,
GEORGE A. ULETT, Director of Division of Mental Disease, State of Missouri,
J. M. GARNER, Acting Director of Division of Health, State of Missouri,
STATE BOARD OF TRAINING SCHOOLS,
W. L. SEARS, Director, Division of Training Schools,
ERIN J. LAMB, JAMES L. COFFMAN, JOHN J. GILLIS, JAMES E. CONWAY, MRS. JUANITA EVANS, ELLIS F. RUCKER, Members of the State Board of Training Schools,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

No.

OUP I—EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI

A. DIVISION OF MENTAL DISEASES:

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Raymond Edgars, Paul Steward, Harold Umfleet, Bobby Watkins,

5. MALCOLM BLISS HOSPITAL, ST. LOUIS, MISSOURI
James A. Ballard, Hardy Bell,

I. DIVISION OF HEALTH:
ELLIS FISCHEL STATE CANCER HOSPITAL, COLUMBIA, MISSOURI
Ruth E. Harris, Betty J. Heisler, Edith J. Sims

OUP II—EMPLOYEES OF STATE BOARD OF TRAINING SCHOOLS, CHILLICOTHE, MISOURI
Latha O. Briscoe,

Petitioners
For Themselves and Others Similarly Situated,
vs.

PARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI,
STIN HILL, Director, Department of Public Health & Welfare, State of Missouri,
VISION OF MENTAL DISEASE, State of Missouri,
RGE A. ULETT, Director of Division of Mental Disease, State of Missouri,
M. GARNER, Acting Director of Division of Health, State of Missouri,
ATE BOARD OF TRAINING SCHOOLS,
L. SEARS, Director, Division of Training Schools,
N J. LAMB, JAMES L. COFFMAN, JOHN J. GILLIS, JAMES E. CONWAY, MRS. JUANITA VANS, ELLIS F. RUCKER, Members of the State Board of Training Schools,
Respondents

TITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, sitting *en banc,* entered on November 11, 1971.

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals is as yet unreported; it is set forth in the Appendix, *infra,* at 1a-25a. The opinion of the three judge panel of the Court of Appeals, prior to rehearing by the Court *en banc,* is unreported and is set out in the Appendix, *infra,* 26a-37a. The order of the District Court granting respondents' motion to dismiss the complaint is also unreported and is printed in the Appendix, *infra,* 39a-40a.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit *en banc* was entered on November 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress intended to authorize suits by employees of State-owned schools and hospitals against a State for wage claims under the Fair Labor Standards Act.

2. Whether, under *Parden* v. *Terminal Ry. Co.,* 377 U.S. 184 (1964), a State is deemed to have waived its 11th Amendment immunity to citizen-employee suits by continuing to engage in activities to which Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 3.

United States Constitution, Amendment XI.

The pertinent provisions of the Fair Labor Standards Act, as amended, Sections 3(d), (r), (s), 16(b), (c), and 17, 29 U.S.C. § 203, *et seq.* are set forth in Appendix B.

Since the proceedings draws into question the constitutionality of Section 16(b) of the Fair Labor Standards Act as affected by the 1966 Amendments, P.L. 89-601, 80 Stat. 830, 29 U.S.C. § 216(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. §2403 may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403, certified to the Attorney General of the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioners are employees of five mental hospitals and a cancer hospital operated by the State of Missouri and employees of the State training school for girls operating under the Department of Corrections of the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision over the State hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the United States District Court for the Western District

of Missouri on August 4, 1969 to recover unpaid overtime compensation due them under § 16(b) of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 216(b). They also seek an equal amount as liquidated damages, as well as attorneys' fees, as provided in the statute.

The District Court in the instant case sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of a State against the State and as such is barred by the Eleventh Amendment and its principle of sovereign immunity.

A three-judge panel of the Court of Appeals, in a two to one decision, reversed the judgment of dismissal and held that Congress, by its passage of certain amendments in 1966, intended to authorize FLSA suits by citizen-employees against a State, and that the State of Missouri had waived its sovereign immunity to suit by continuing to operate its hospitals and schools after passage of the 1966 amendments extending coverage to employees of those institutions. It based its decision on *Maryland* v. *Wirtz,* 392 U.S. 183 (1968) in which this Court upheld the validity of the 1966 FLSA amendments (but reserving the right-to-sue issue) and *Parden* v. *Terminal Ry. Co.,* 377 U.S. 184 (1964) which held that Congress, under its Commerce Clause power, could validly subject States to employee suits.

In a rehearing before the Eighth Circuit Court of Appeals *en banc,* that Court, in a 5 to 4 decision, distinguished *Parden* and vacated the judgment of the three-judge panel. It thereby upheld the trial court's dismissal of the complaint by the State employees against the State of Missouri agencies.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of the Tenth Circuit Court of Appeals as to Whether Sovereign Immunity Bars a Suit for Wage Claims Under the Fair Labor Standards Act by State Employees Against a State.

Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), authorizes suits by employees against employers for the amount of their unpaid overtime compensation and an additional equal amount as liquidated damages as well as reasonable attorney's fees and costs.

The original Act excluded States from its coverage. However, amendments were adopted by Congress in 1966 which extended the Act to hospitals and schools, 29 U.S.C. §§ 203(r), (s)(4), P.L. 89-601, 80 Stat. 830, and also expanded the definition of covered employers to include States and their political subdivisions, 29 U.S.C. § 203(d).

This Court considered the effect of those amendments in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). It upheld their validity against the challenge by the State of Maryland (joined by 27 other States) that they violated the Eleventh Amendment and the doctrine of sovereign immunity and ruled that Congress could, under its Commerce Clause power, make the overtime and minimum wage provisions of the Fair Labor Standards Act applicable to employees of State schools and hospitals.

However, the Court expressly reserved for appropriate future cases the issue of whether particular remedial provisions might not be be available when a State is involved as an employer-defendant:

> ". . . (W)e decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various

remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases." 392 U.S. at 200.

Two Circuits have now taken up these reserved questions—with directly contradictory results.

Here, the Eighth Circuit Court of Appeals, in a 5 to 4 decision, has held that "a state is immune from a suit brought against it by its citizens on the basis of a reasonable interpretation of the original Constitution and additionally upon the basis of the Eleventh Amendment" (App. at 5a).[1] It distinguished *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964) in which this Court held that Congress under its commerce power could validly subject States to employee suits under the Federal Employees Liability Act. "We are convinced," said the Court below, "that the State has not waived its sovereign immunity or consented to be sued in an action by its hospital and training school employees for overtime compensation under § 216(b)" (App. at 12a).

The Court below was aware that its decision directly conflicted with the decision of the Tenth Circuit in *Briggs* v. *Sagers*, 424 F.2d 130 (1970), *cert. denied* 400 U.S. 829 (1971). There the Tenth Circuit, in applying the *Parden* doctrine, rejected Utah's defense of sovereign immunity to a federal court suit under FLSA by State employees. It found unpersuasive all of the factors relied upon by the majority in the Court below to distinguish *Parden* and ruled that the State had im-

[1] The Eleventh Amendment by its terms only bars suits against a State by citizens of other States, but this Court has consistently interpreted it to bar suits against a State by its own citizens since *Hans* v. *Louisiana*, 134 U.S. 1 (1890) absent the waiver issue involved herein.

pliedly waived its sovereign immunity by continuation of its operation of state institutions which had been defined by Congress as enterprises in interstate commerce and thus subject to Congressional regulation.

In addition to the decisions in these two Circuits, there is now pending in the Fifth Circuit Court of Appeals, *Williams* v. *University of Texas,* C.A. No. 71-3183 (5th Cir.), involving the exact same issues and law. There the District Court ruled in favor of the State of Texas and dismissed the complaint on the basis of sovereign immunity.

In two other cases overtime wage claim suits against State agencies under the 1966 FLSA amendments were successfully maintained, although the courts did not consider the constitutional issues involved here. *King* v. *Board of Education,* 435 F.2d 295 (7th Cir. 1970), *cert. denied* 402 U.S. 908 (1971); *Glick* v. *Montana,* 485 P.2d 42 (Mont. S. Ct. 1971).

At the present time, there is the incongruous situation of a citizen-employee of a State being able to sue for a federally created wage claim against his State only if he happens to live in a State within a favorable circuit. Congress, at the very least, certainly intended a uniform national policy on this question.

It is clear that the issues left unresolved in *Maryland* v. *Wirtz* have not been dormant and are likely to produce further litigation unless resolved by this Court. The conflicts in the circuits now justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises Important Federal and Constitutional Issues of Sovereign Immunity, Agency, and Consent to Suit Specifically Left Open by This Court.

In *Maryland* v. *Wirtz, supra,* at 200, this Court noted that in the FLSA remedial provisions there were important issues "percolating . . . of interests of the

United States and problems of immunity, agency, and consent to suit." They include the following, which can only be answered by an authoritative decision of this Court:

(1) Did Congress intend to authorize suits by State employees against the States under the Fair Labor Sandards Act?

The provision in question is § 16(b) of the Act which provides that "*Any employer* who violates the pay provisions of this Act shall be liable to the employee or employees affected" in an action brought by the employees. Nothing in the Act, as amended in 1966, provides that States are to be treated any differently from any other employer under its remedial provisions.

The Court below, in its opinion, is not entirely clear whether it is holding that Congress had no power—or did not intend—to permit State employees to sue the State under the Act. Although the 1966 amendments did not say specifically that the right of employees to sue was also enforceable against a State as an employer, certainly there is a far stronger case for finding such a Congressional intent than under the Federal Employees Liability Act at issue in *Parden* v. *Terminal Ry Co., supra.* In that case, the majority held that Congress had the power *and* intent to impose FELA liability on all carriers, including State-owned ones, and denied the claim of immunity to suit although the States were not specifically mentioned in the statute. This Court had reached similar results in *United States* v. *California,* 297 U.S. 175 (1936) as to the Federal Safety Appliance Act, and in *California* v. *Taylor,* 353 U.S. 553 (1957) with regard to the Railway Labor Act.

(2) Whether a State is deemed to have waived its Eleventh Amendment immunity to citizen-employee suits by continuing to engage in activities to which

Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power?

This Court's decision in *Parden* v. *Terminal Ry. Co.* was recognized by both the majority and dissenters below as the leading case on this issue. There, this Court held that sovereign immunity was not a bar to a federally created right to sue the State by citizen-employees of a State-owned railroad. The rationale in *Parden* is that consent by a State to be sued would be implied as a matter of federal law from the fact of State engagement in commerce subject to Congressional regulation:

> "By empowering Congress to regulate commerce then, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. . . 'The state, by engaging in interstate commerce, and thereby subjecting itself to the Act, must be held to have waived any right it may have had arising out of a general rule that a sovereign state may not be sued without its consent.'" 377 U.S. at 192, 193.

The Court below, however, demanded *actual* consent to be sued and waiver of sovereign immunity. It said that such consent or waiver would not be implied—but must be "knowingly and intelligently" waived. Indeed, it relied on *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) in indulging in "every reasonable presumption against waiver," holding to the same standard of waiver of sovereign immunity as waiver of an accused's Sixth Amendment right to counsel. Cf. Dissent in *Parden* v. *Terminal Ry. Co.,* 377 U.S. at 198.

The Eighth Circuit below distinguished *Parden* in four respects: (1) the availability of "other remedies," such as suits by the Secretary of Labor under § 16(c) for back pay and § 17 injunction proceedings; (2) the provision for liquidated double damages and

attorney's fees under § 16(b); (3) the nature of the activities regulated, *i.e.*, whether "governmental" or "proprietary"; and (4) the fact that the State's operation of the hospitals and the school pre-dated the passage of the 1966 amendments extending the Act's coverage.

In contrast, the Tenth Circuit in *Briggs* v. *Sager, supra,* rejected these asserted distinctions. Thus, the four distinctions are really four unresolved questions.

Although the FLSA also provides remedies for violation of the Act through suits by the Secretary of Labor under §§ 16(c) and 17, there was no discussion by the majority in the Court below on the adequacy of these alternatives. It should be noted, for example, that the Secretary of Labor did not file suit in this case until January 27, 1971—almost a year and a half after the petitioners filed suit on August 7, 1969.

The Secretary of Labor by invitation of the Court below filed an *amicus* brief. He pointed out that the sheer number of establishments (almost two million) under the Act permitted the Department to investigate less than four per cent each year. Also the §16(b) suits by employees assures them of an opportunity of having their claims presented to a court. Actions under §§ 16(c) and 17 are within the discretion of the Secretary of Labor "who represents interests which may be distinct from the personal interests of the individual employee" (*Amicus Curiae Brief,* Secretary of Labor, at 17). Also a proviso bars the Secretary from suing in "any case involving an issue of law which has not been settled finally by the courts." See *Hodgson* v. *Ewing,* — F.2d — (Fifth Cir.) No. 71-1733, Nov. 24, 1971. This "novel question" proviso has contributed to making "the § 16(c) remedy . . . for all practical purposes

a dead letter." *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 532 (3rd Cir. 1971).

The dissent below saw no reason to reach the issue of liquidated damages and attorney's fees under FLSA, since the District Court dismissed the action in its entirety. However, it did note the provisions of the FLSA grant discretion to the District Court to deny liquidated damages if the employer shows "good faith" or "reasonable grounds" to believe his omission was not a violation of the FLSA. See Portal-to-Portal Act of 1947, § 11, 29 U.S.C. § 260, 61 Stat. 89. In any case, it is unclear what relevance the issue of liquidated damages has to the doctrine of sovereign immunity. The issue is one of the right to sue a State—not how much can be collected.

The Court below held that the *Parden* doctrine of implied waiver of sovereign immunity should not apply when the function involved is a "governmental" rather than a "proprietary" one. However, it failed even to acknowledge the statement by this Court in *Maryland* v. *Wirtz* that the federal government when acting within a delegated power "may override countervailing State interests whether these be described as 'governmental' or 'proprietary' in character." 392 U.S. at 195.

Great emphasis was placed by the Court below on the fact that the State had operated schools and hospitals long before the 1966 Amendments and, therefore, had no occasion to choose between staying out of the field or entering it subject to the conditions imposed under the commerce power. However, nothing appears in the legislative history of the Act to suggest that Congress intended to establish procedural rights only for employees of State institutions founded after 1966. See S. Rept. No. 1487, 89th Cong. 2d Sess; H. Rept. No. 1366, 89th Cong. 2d Sess.

In *Briggs*, the Tenth Circuit held that the State, by continuing to run hospitals and schools after passage of the 1966 Amendments, thereby accepted the Congressional conditions attached under the FLSA. It said:

> "When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw." [424 F.2d at 134]

It would, indeed, be anomalous if the Act only applied to hospitals and schools opened by a State after 1966 and not those in existence before. However, that would be the effect of this distinction drawn by the Court below.

3. The Issues Presented in This Case Are of Great National Importance Affecting Millions of People.

The Secretary of Labor has reported that the 1966 Amendments have added 2.7 million employees and 119,000 establishments in the sector of local government employment to FLSA coverage.[2]

In a survey conducted by the Department of Labor in 1969, it was determined that 619,000 employees, nearly three out of ten hospital employees brought under the coverage of the FLSA, worked in hospitals operated by State and local governments.[3]

Almost one-fourth of the 1,791,000 non-supervisory employees in the country's educational institutions

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[2] The Secretary of Labor's Report to the 92nd Congress under Section 4(d) FLSA 1971, Tables 29 and 35.

[3] U.S. Department of Labor, Wage and Labor Standards Administration, Economic Effects Studies: *Hospitals*—Submitted to the Congress—1970, pp. 10-11.

covered by the Act obtained higher minimum wages in February 1970, due to the effect of FLSA's 1966 Amendments. Regionally, the highest impact was in the South where, in March 1969, 42% of the workers were paid less than $1.45 an hour.[4]

These statistics alone indicate the importance of the issues in this case to millions of Americans, *Patterson* v. *Lamb,* 329 U.S. 539 (1947), particularly those who are in the lowest economic levels—in addition to the undeniable importance of the Constitutional questions. It is clear that much of the protection of the FLSA will be lost to those who need it the most if they are given coverage of the Act but are denied the forum in which to enforce it.

4. The Court Below Has Asserted a Balancing Test for Conflicting Constitutional Claims Directly Contrary To Applicable Decisions of This Court.

This Court in *Maryland* v. *Wirtz* has already ruled on the pre-eminence of the Federal Government's power under the Commerce Clause over the asserted right of State sovereign immunity. It said explicitly "... (I)t is clear that the Federal government when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). In short, it said that the argument that a Congressional Act, passed under the aegis of the commerce power, must yield to state sovereignty in the performance of governmental functions "simply is not tenable" (*ibid*).

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[4] U.S. Department of Labor, Wage and Labor Standards Administration, Economic Effects Studies: *Educational Institutions*—Submitted to the Congress—1970, pp. 2, 8.

In spite of that, the Court below nevertheless concluded:

> "If any balancing of rights under the Commerce Clause against the right of the State's sovereign immunity is required, the well recognized constitutional guarantee of sovereign immunity should prevail." App. at 9a.

In *Wirtz*, this Court pointed out (392 U.S. at 195) that "the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" had been "put to rest" as long ago as *Sanitary District* v. *United States*, 266 U.S. 405 (1924). See also *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508 (1941).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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February 9, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,204.

Appeal from the United States District Court for the Western District of Missouri.

Employees of the Department of Public Health & Welfare, State of Missouri, et al., *Appellants,*

v.

Department of Public Health & Welfare, State of Missouri, et al., *Appellees.*

November 11, 1971.

Before MATTHES, Chief Judge, VAN OOSTERHOUT,* Senior Circuit Judge, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT Ross and STEPHENSON, Circuit Judges, sitting en banc.

VAN OOSTERHOUT, Senior Circuit Judge.

Plaintiffs, named employees of various Missouri State institutions, brought this class action under 29 U.S.C.A. § 216(b)[1] to recover unpaid overtime compensation due

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*Judge Van Oosterhout participated in the decision of this case by a panel of this court in which opinion was filed on April 2, 1971.

[1] 29 U.S.C.A. § 216(b) reads:

"Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

them under the Fair Labor Standards Act as amended, 29 U.S.C.A. § 201 et seq. They also seek an equal amount as liquidated damages and ask for attorney's fees, all of which is provided for by § 216(b).

Plaintiffs are named employees of five mental hospitals and a cancer hospital operated by the State of Missouri, and employees of the state training schools for girls operated under the Department of Corrections of the State of Missouri.[2]

Defendants are the Department of Public Health & Welfare of the State of Missouri, the State Board of Training Schools and various State Board members and officials

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Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection."

[2] This action is brought as a class action. Section 216(b) provides that no employee shall be a party plaintiff unless written consent thereto is given by the named plaintiffs. Whether consent has been given by other members of the class does not appear. The issue of whether members of the class other than named plaintiffs are covered by this action is immaterial in light of the dismissal. We express no opinion upon this issue.

having supervision of the state hospitals and training schools. Such officials are sued in their official capacity and as individuals.

The trial court sustained defendants' motion to dismiss the complaint upon the ground that this is a suit by citizens of the State against the State and as such is barred by the Eleventh Amendment. Plaintiffs took a timely appeal from the judgment of dismissal.

A panel of this court to which the appeal was submitted reversed the judgment of dismissal for reasons stated in an opinion filed April 2, 1971. The writer of this opinion dissented. A rehearing en banc was granted; supplemental briefs were filed by the parties. At the invitation of the court, James D. Hodgson, Secretary of Labor, filed a brief amicus curiae supporting the position of the plaintiff-employees. Rehearing en banc was held on September 13, 1971.

The basic issue presented by this appeal is whether the plaintiffs' action is barred by the Eleventh Amendment. The subsidiary question is whether the State has waived sovereign immunity. We hold that the present action is barred by the Eleventh Amendment and that the State of Missouri has not waived sovereign immunity or consented to this suit. We vacate our prior judgment of reversal and affirm the judgment of dismissal for the reasons hereinafter stated.

The Fair Labor Standards Act of 1938 did not cover State employees. Employees of State schools and hospitals were first brought under the coverage of the Act by a 1966 amendment. The nature and scope of the Amendment are set out in *Maryland* v. *Wirtz*, 392 U.S. 183. The majority opinion in that case authoritatively determined that Congress can and did under its Commerce Clause power make the overtime and minimum wage provisions of the Fair Labor Standards Act as amended applicable to employees of State schools and hospitals.

All of the State hospitals here involved fairly fall within the definition of hospital in the amended Act. Under Wirtz, the hospital employees are clearly covered by the Act. A fact issue arises as to whether the training school for girls is a school within the meaning of the amended Act but we will for the purpose of this case assume that it is a school without so deciding.

We now reach the sovereign immunity issue. The Eleventh Amendment, which became effective in 1794, reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

Although the Eleventh Amendment by its terms bars only suits against the State by citizens of other States, the Amendment has been consistently interpreted as barring suits against the State by its own citizens. *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184; *Hans* v. *Louisiana*, 134 U.S. 1. As pointed out in *Hans*, the Eleventh Amendment was the prompt response of Congress, the States and the people to the holding of a divided Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, that states were subject to suits by individuals. Supreme Court opinions handed down since Chisholm have repudiated the majority opinion in that case rejecting pre-Eleventh Amendment sovereign immunity on the part of the States. Thus in *Monaco* v. *Mississippi*, 292 U.S. 313, the Court denied the right of a foreign government to sue a State on the basis of sovereign immunity. No express State immunity from such a suit is found in the Constitution. The Court quotes views expressed by Madison, Hamilton and Marshall and states:

> "There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where

there has been 'a surrender of this immunity in the plan of the convention.' " 292 U.S. 313, 322-23.

The Court holds:

"The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. *Ex parte State of New York, No. 1, supra,* p. 497; *Missouri* v. *Fiske,* 290 U.S. 18, 25, 26.

"4. Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. . . ." 292 U.S. 313, 329-30.

Accord, *Parden* v. *Terminal Ry. Co.,* supra; *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 51; *Hans* v. *Louisiana,* 134 U.S. 1, 10-16.

It fairly appears from the authorities just cited that a state is immune from a suit brought against it by its citizens on the basis of a reasonable interpretation of the original Constitution and additionally upon the basis of the Eleventh Amendment.

Parden v. *Terminal Ry. Co.,* supra, relied upon by the plaintiffs and by the Tenth Circuit in *Briggs* v. *Sagers,* 10 Cir., 424 F.2d 130, in both the majority and minority opinion, fully recognizes that sovereign immunity exists upon the factual background both in that case and in this case. The *Parden* majority holds: "Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent." 377 U.S. 184, 192.

The *Parden* minority in an opinion by Mr. Justice White, concurred in by Justices Douglas, Harlan and Stewart, agrees that State immunity exists, stating:

> "The majority today follows the Court's consistent holdings that an unconsenting State is constitutionally immune from federal court suits brought by its own citizens as well as by citizens of other States. It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another." 377 U.S. 184, 198.

The minority opinion then expresses sharp disagreement with the view of the majority on the waiver issue:

> "In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171. See *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 468-470. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment or abandonment of a known right or privilege' which must be shown before constitutional rights may be taken to have been waived. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Fay* v. *Noia*, 372 U.S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." 377 U.S. 184, 199-200.

The critical issue in our present case, as in *Parden*, is whether the State has consented to a suit against it by its citizen employees. The Supreme Court in *Wirtz* clearly states that it is not passing on the sovereign immunity issue which now squarely confronts us. The Court cites

Parden but does not discuss or pass upon whether the *Parden* waiver theory applies in the present situation.[3]

On the sovereign immunity issue, the *Wirtz* Court states:

> "Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184. The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the employer-defendant. Particularly in light of the Act's 'separability' provision, 29 U.S.C. § 219, we see no reason to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases. At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. *Questions of state immunity are therefore reserved for appropriate future cases.*" (Emphasis added.) 392 U.S. 183, 200.

Thus the question of whether the *Parden* waiver theory applies to the factual situation presented by this case is an open and undecided issue.

As heretofore pointed out, the original Constitution and the Eleventh Amendment afford States as sovereigns immunity from suits by private individuals. It is not disputed that the present action against State officials is in effect a suit against the State. See *Maryland* v. *Wirtz*,

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[3] The Supreme Court had divided sharply on the waiver issue in Parden. At the time of the Wirtz decision, only two members of the Parden majority remained on the Court. The four dissenters remained on the Court.

supra; *Great Northern Ins. Co.* v. *Read*, supra, p. 51 of 322 U.S.

The parties to this action agree that the State of Missouri has no constitutional or statutory provision authorizing a suit such as this and that it has never expressly consented to this suit.

If any consent to the present suit exists, it arises out of the *Parden* waiver theory. Plaintiffs contend waiver of State sovereign immunity must be applied upon the basis that the State continued to operate its hospitals and training schools subsequent to the adoption of the 1966 Amendment to the Fair Labor Standards Act. Waiver has been defined as "an intelligent relinquishment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Fay* v. *Noia*, 372 U.S. 391, 439.

In *Johnson* v. *Zerbst*, p. 464 of 304 U.S., the Court states: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" The constitutional right involved was the accused's right under the Sixth Amendment to be represented by counsel. Here the constitutional right involved is sovereign immunity granted by the Eleventh Amendment. The United States, like State governments, possesses sovereign immunity.

With respect to sovereign immunity by the United States, the Supreme Court reads consent to jurisdiction provisions of the statutes restrictively. *Honda* v. *Clark*, 386 U.S. 484; *McMahon* v. *United States*, 342 U.S. 25; *United States* v. *Sherwood*, 312 U.S. 584, 590; *United States* v. *Shaw*, 309 U.S. 495. See *Peterson* v. *United States*, 8 Cir., 428 F.2d 368.

Controlling legal principles and proper federal-state relations require that the standards applicable to federal

immunity should be applicable to the sovereign immunity of the States.

The appropriate principles applicable to State sovereign immunity are well summarized by Mr. Justice White in his dissenting opinion in *Parden* heretofore referred to.

A serious doubt exists whether Congress could by express and appropriate language provide that a State by continuing to operate essential government functions, such as here involved, would lose its constitutionally guaranteed sovereign immunity. The prohibition of suits by individuals against the State is stated broadly in the Eleventh Amendment. There is no language in the Amendment which expressly or impliedly excepts from its operation rights given the federal government under the Commerce Clause. To the extent that any inconsistency exists between the powers granted by the Commerce Clause and the Eleventh Amendment, the Eleventh Amendment as the more recent expression of the will of the people should prevail. See 16 Am. Jur. 2d, Constitutional Law, § 69 and cases there cited.

If any balancing of rights under the Commerce Clause against the right of the State's sovereign immunity is required, the well-recognized constitutional guarantee of sovereign immunity should prevail. An adverse effect on commerce which might result from preserving sovereign immunity in the present situation is minimal, particularly in view of other available remedies for enforcement of the provisions of the Act.[4]

The discontinuance of the State mental hospitals for those needing care and unable to pay, and the discontinuance of the correctional schools would seriously adversely

[4] The Secretary in his brief states that he commenced an action on January 27, 1971, for injunction and back-pay on behalf of the State hospital employees.

affect the public interest and welfare of the State. If the State ceased to perform such services, it is unlikely that private enterprise would step in to fill the need.

Moreover, we find nothing in the 1966 amendment to the Fair Labor Standards Act or in its legislative history which fairly informs the State that it will lose its constitutionally granted sovereign immunity by continuing to operate its hospitals and training schools. Prior to the resolution of the issue in *Wirtz*, a substantial question existed as to whether the provisions of the Fair Labor Standards Act could be extended to the States. See dissenting opinion in *Wirtz*.

We are satisfied that the State at no time knowingly and intelligently waived its sovereign immunity defense to the present action. The continuance by the State of its mental hospitals and training schools subsequent to the 1966 amendment does not constitute a waiver of sovereign immunity.

The waiver rule announced in *Parden* would have to be enlarged and extended to fit the present case. *Parden* is distinguishable from our present case in four respects:

(1) In *Parden* the Court states, "It would be even more surprising to learn that the FELA does make the Terminal Railway 'liable' to petitioners, but, unfortunately, provides no means by which that liability may be enforced." 377 U.S. 184, 197.

The *Wirtz* Court specifically recognized that remedies other than those provided in § 216(b) are available. Such remedies are provided for in the form of actions by the Secretary under §§ 216(c) and 217. Suits by State employees for injuctive relief may be available against State officials in their individual capacities under *Ex parte Young*, 209 U.S. 123.

(2) The remedy sought in *Parden* did not include double damages. Section 216(b) permits double damages and

allowance of attorney's fees. It cannot reasonably be inferred from the statute and its legislative history that Congress intended to impose such penalties on sovereign States. The Secretary in brief states that the trial court in its sound discretion can under 29 U.S.C.A. § 260 withhold liquidated damages or reduce such damages, and consequently the liquidated damages issue is premature. We do not agree. Under § 260 remission of liquidated damages in whole or in part is only allowable "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, . . ." And even if the required showing is made, the remission is left to the sound discretion of the court.

Upon this record, it cannot be said that there is any certainty that a federal court will make the finding required by § 260, or if such finding is made, that it would be an abuse of discretion for the court to allow double damages.

To permit a federal court to punish a State by awarding double damages is inconsistent with the well-entrenched doctrine of sovereign immunity and the historical background of such immunity.

(3) The *Parden* majority states: "But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. 184, 196. The operation of the railroad in Parden is a proprietary function which could reasonably be considered as a departure by the State from a sphere that was exclusively its own. The operation of the mental hospitals and training schools in our present case is a governmental function. Hospital-

ization of a substantial number of mental patients is required for the protection of the public as well as the patients.

The State has no realistic option open to it to discontinue its mental hospitals and training schools forthwith.

(4) In *Parden*, the Federal Labor Standards Act had been in effect for some twenty years before the State commenced its railroad operation. In our present case, the State hospitals and training schools had been in existence and operation for many years before the enactment of the 1966 Amendment of the Fair Labor Standards Act. The State did not enter into any new form of activity subsequent to the enactment of the Amendment.

The factual distinctions between our present case and *Parden* are such as to satisfy us that the *Parden* waiver of sovereign immunity holding should not be extended to and applied in the present situation. We are convinced that the State has not waived its sovereign immunity or consented to be sued in an action by its hospital and training school employees for overtime compensation under § 216(b).

The prior judgment of this court reversing the judgment of the trial court dismissing the complaint is vacated and set aside. The judgment dismissing the complaint is affirmed.

BRIGHT, Circuit Judge, with whom Judges LAY, HEANEY and STEPHENSON, join dissenting.

We reject the thesis of the majority that any waiver of sovereign immunity to suit in this case must rest upon actual as opposed to constructive consent to be sued by the State of Missouri. Where, as here, state policy conflicts with a federally created right, the question of waiver vel non is determined by the scope and effect of the federal law.

In resolving this issue as presented on this appeal, whether Missouri has waived its Eleventh Amendment immunity to private suit within the context of the 1966 amendments to the Fair Labor Standards Act, it is necessary to examine the nature of the federally created right, the constitutional underpinning for the federal legislation and the intent of Congress.

The State of Missouri operates schools and hospitals, the employees of which are now entitled to minimum wages and overtime compensation pursuant to the 1966 amendments to the Fair Labor Standards Act (FLSA). The Act gives an employee or employees a right of action "in any court of competent jurisdiction" to recover amounts due from an employer who violates the minimum wage or overtime compensation provisions of the Act.[1]

Pursuant to these amendments and other provisions of the Fair Labor Standards Act (29 U.S.C. § 201-219), plaintiffs, employees of several Missouri state institutions, brought the present action seeking to recover unpaid overtime compensation and additional amounts for liquidated damages and attorney's fees. The parties agree that the instant suit is primarily directed against the State of Missouri, and the plaintiffs further admit that Missouri has

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[1] 29 U.S.C. § 216(b). The Fair Labor Standards Act provides several remedies. In addition to granting employees a private right of action for their unpaid minimum wages or unpaid overtime compensation, they may also recover "an additional equal amount as liquidated damages" and may collect "a reasonable attorney's fee . . . and costs." *Id.* The Act also provides that upon written request by an eligible employee, "the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim. . . ." 29 U.S.C. § 216(c). However, the consent of an employee to an action by the Secretary of Labor constitutes "a waiver by such employee of any right [of action] he may have under subsection (b)." *Id.* The Secretary may also bring an action seeking injunctive relief against any employer violating the Act. 29 U.S.C. §§ 211(a), 217.

never expressly consented to this suit. On motion by the State, the federal district court dismissed the action, concluding that the principles of sovereign immunity incorporated in the Eleventh Amendment bar federal judicial action in this suit. Plaintiffs prosecute this appeal from the judgment of dismissal. Upon initial submission of this, a panel of this court reversed the district court (Bright, Circuit Judge, and Neville, District Judge, for reversal; Van Oosterhout, Circuit Judge, dissenting).[2] For the reasons stated below, we agree with the panel decision and would reverse.

We first review briefly the statutory history of the Fair Labor Standards Act of 1938, and the 1966 amendments thereto. This legislation serves "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 706 (1945). *See* 29 U.S.C. § 202. In its original form, the Act *specifically excluded* "any State or political subdivision of a State" from its definition of an "employer" subject to the provisions of the Act. In 1966, Congress extended the protection afforded by the Act to the employees of any institution or enterprise which is

> engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit). [29 U.S.C. § 203(s)(4) (Supp. 1970)]

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[2] The panel opinion, No. 20,204, April 2, 1971, is unreported.

Congress also expanded the Act's definition of "employer" to include the States and their political subdivisions, thus affording the protection of the Act to state employees working in such hospitals, institutions, and schools. 29 U.S.C. § 203(d) (Supp. 1970).

In *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Supreme Court held the 1966 amendments to constitute valid legislation enacted pursuant to the federal commerce power. The Court rejected the contentions of Maryland and other states that Congress' power over interstate commerce must yield to a state's sovereign immunity in the latter's performance of its governmental functions. Justice Harlan, speaking for the Court, observed:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. [392 U.S. at 197]

The Court, however, specifically reserved comment on the enforceability of the provisions of the Act through which suits could be directed against the State. The majority stated:

> Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden* v. *Terminal R. Co.*, 377 U.S. 184. The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the employer-defendant. Particularly in light of the Act's "separability" provision, 29 U.S.C. § 219, we see no reason to strike down otherwise valid portions of the act simply because other portions might not be constitutional as applied to hypothetical future cases.

> At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases. [392 U.S. at 200].

In dismissing plaintiffs-appellants' action, the district court relied upon a decision rendered by a federal district court in Utah dismissing a similar suit, one brought by state welfare department employees against the State of Utah for recovery of overtime compensation under the FLSA. *Briggs* v. *Sagers*, 301 F.Supp. 1023 (D. Utah 1969). However, the Tenth Circuit has now reversed that decision. *Briggs* v. *Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

A suit such as this one, by resident state employees against the State, does not fall within the literal terms of the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

The Supreme Court has construed this amendment to bar suits in federal court brought by a state's own citizens, as well as citizens from other states. *Hans* v. *Louisiana*, 134 U.S. 1(1890).

Appellants contend that the State of Missouri has waived its Eleventh Amendment rights by continuing to operate the schools and hospitals knowing that the employees thereof are now afforded protection by the Fair Labor Standards Act. In urging a waiver of these rights, appellants rely

primarily upon the Supreme Court's decision in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), and the Tenth Circuit's ruling in *Briggs, supra*, 424 F.2d 130.

In *Parden*, employees of an Alabama-owned railway brought an action in federal court against the state railway for personal injuries under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60. Alabama contended that Congress lacked the constitutional authority to subject a state to a private suit under the FELA, without its express consent, because of the Eleventh Amendment guarantee. The Supreme Court concluded that the state's operation of a railroad in interstate commerce constituted a waiver of its sovereign immunity and operated as a consent to be sued by its employees in federal courts under the FELA. The Court ruled in *Parden* that consent to suit rested upon conditions Congress attached to the state's action, and actual assent need not be given. In so ruling, the Supreme Court relied in part upon its earlier decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), where the Court permitted a Jones Act claim against a bi-state authority created by an interstate compact.[3] The Court observed in *Parden:*

> Where a State's consent to a suit is alleged to arise from an act not wholly within its sphere of authority

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[3] In *Petty*, plaintiff brought an action under the Jones Act against an agency of the States of Tennessee and Missouri which had been created by a compact entered into between them with the consent of Congress. In approving the compact, Congress had attached a proviso that its approval should not be construed as affecting, impairing, or diminishing federal court jurisdiction over matters arising under the compact. Interpreting these instruments under federal law, the Supreme Court determined that the States had consented to this kind of suit, although, under state law, the language of the compact would have preserved the States' immunity from any tort liability such as asserted by the plaintiff. The Court reversed a panel of this court which, in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958), had ruled the bi-state agency an instrumentality of both States and immune from suit under the Eleventh Amendment.

but from within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the allleged consent is one of federal law. Here, as in *Petty*, the States by venturing into the congressional realm "assume the conditions that Congress under the Constitution attached." 359 U.S. at 281-282. [377 U.S. at 196]

The Tenth Circuit applied the *Parden* doctrine in *Briggs, supra*, and rejected Utah's defense of sovereign immunity to a federal court suit under the FLSA by state employees. The court said:

> [W]e think the express intent of Congress and the language of *Parden* must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, e.g., interstate commerce, is plenary as to those matters. Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments. To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation.
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> When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw. [424 F.2d at 133-34 (footnotes omitted)]

By application of the principles of *Parden* and *Briggs*, we reject Missouri's claim of Eleventh Amendment sovereign immunity. We think it clear that actual consent by a State is immaterial when a plaintiff sues a state upon a cause of action based on rights expressly created by Congess. The state's consent results from the interrelation of the activities of the state and regulations placed thereon by Congress. *See generally Private Suits Against States in the Federal Courts*, 33 U. Chi. L. Rev. 331 (1966).

The majority opinion seeks to distinguish *Parden* on several grounds, asserting: 1) Since the FLSA provides remedies for violations of the Act through suit by the Secretary under §§ 216(c) and 217, employees may be able to sue their supervisors as individuals; the Act should not be construed to authorize a direct suit against the State by state employees; 2) The remedy approved in *Parden* did not, as here, provide for a penalty of double damages plus attorney's fees; 3) In *Parden* the State of Alabama exercised a propriety function in operating a railroad; here Missouri exercises a governmental function in operating schools and hospitals; and 4) Missouri has continued an existing activity in the operation of schools and hospitals while in *Parden*, Alabama commenced railroading twenty years after the enactment of FELA.

The first ground of distinction relates to a problem of statutory construction. In *Parden*, the Court considered an act, which, though conferring a federal remedy generally to railroad employees, did not specifically mention employees of state-owned railroads. 377 U.S. at 188-89. The *Parden* Court nonetheless applied the act "to state railroads and their employees." 377 U.S. at 189.

Here, unlike the legislation considered in *Parden*, the 1966 amendment to FLSA specifically brought state employees of hospitals and certain schools within the coverage of the Act. Thus the issue which divided the Supreme

Court in *Parden* is not present in the same context in this case. Mr. Justice White for the dissenters in *Parden* conceded:

> I agree that it is within the power of Congress to condition a State's permit to engaged in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.
>
> However, the decision to impose such conditions is for Congress and not for the courts. [*Id.* at 198]

Although the statute here under consideration is specific in its inclusion of state employees, we must next consider whether it is inferable from the Act that Congress intended that states be subject to private suit for violations of the FLSA.

While we agree with the majority that the history of the 1966 amendments to the FLSA disclose no direct legislative expression of intent concerning the right of a state employee to sue his employer to recover unpaid compensation wages due under the Act, we find in the circumstances surrounding this legislation a strong inference that Congress intended to afford state employees the same direct right of suit against their employers as is possessed by covered employees of nongovernmental employers.

We have already noted that in enacting the 1966 amendments to the FLSA, Congress explicitly placed certain state employees within the coverage of the Act. Congress adopted these amendments in the light of other provisions

affording employees a right to collect compensation against an offending employer "in any court of compentent jurisdiction." 29 U.S.C. § 216(b). We think it unreasonable to presume that Congress would have intended the Act's protection to cover state employees, and at the same time deny them an appropriate forum in which to enforce their rights. As the Supreme Court noted in *Parden*:

> [W]e should not presume to say, in the absence of express provision to the contrary, that it [Congress] intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy.... We are unwilling to conclude that Congress intended so pointless and frustrating a result. [377 U.S. at 190]

Under statutory language far less compelling, *Parden* interpreted the statute there in question to apply to state-employers and to authorize suit. Moreover we do not believe that the existance of other indirect avenues of relief for the state employee under FLSA makes the *Parden* rationale inapplicable. These indirect avenues of legal recourse against the state include suit by the Secretary of Labor on behalf of employees under 29 U.S.C. § 216(c) or an action for injunctive relief under 29 U.S.C. § 217. *See* note 1, *Supra*. The majority suggests that employees may sue their superiors under doctrines enunciated in *Ex parte Young*, 209 U.S. 123 (1908).

Neither appellees nor the majority offer any reasons why the alternatives afford a more appropriate remedy than a private action by the employees against the State for violation of the Act. In fact, the Act's statutory scheme of enforcement seems to give preference to the individual's private right of action. It specifies that: "Any employer who violates the provisions of [the Act] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their un-

paid overtime compensation . . .," 29 U.S.C. § 216(b); but authorizes the Secretary to bring an action on behalf of an employee only "[w]hen a written request is filed." 29 U.S.C. § 216(c). Since we find no statutory basis to indicate that individual employees should forego any personal right of action against the state as an employer, we would reject this argument.

For a second ground, the majority distinguishes the statute here from that in *Parden*, since the FLSA allows assessment of liquidated damages and attorney's fees. This issue is not yet before us in fact, since the district court dimissed the action in its entirety. While it is difficult for us to envision circumstances justifying the enforcement of penalty provisions of the FLSA against a state-employer in light of 29 U.S.C. § 260,[4] we, in accord with guidelines suggested in *Wirtz, supra*, see no reason "to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases." *Id.* at 200.

Thirdly, we see no necessity to distinguish *Parden* on the basis of the nature of the state's function—the railroad in *Parden* as a proprietary one; the schools and hospitals here as governmental. The majority cites no case to support this distinction. In *Wirtz, supra*, the Court noted: ". . .[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." (392 U.S. 195). Moreover that distinction appears imaterial in light of the rule that waiver of a state to suit turns on federal, not state, law. *See* discussion in *Parden, supra* 377 U.S. 195-96, and dissenting opinion at 198.

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[4] That section grants discretion to the district court to deny liquidated damages if the employer shows "good faith" or "reasonable grounds" to believe his omission was not a violation of the FLSA.

Finally, we turn to the sugestion that waiver by constructive consent to suit should not be implied since, unlike *Parden*, Congress legislated in this field long after Missouri had entered into the business of operating the schools and hospitals here in question.

We adopt the argument made by the court in *Briggs* v. *Sagers, supra*, 424 F.2d 130:

> Although *Parden* does rely in part upon an intervening lapse of twenty years, it is not so crucial to the principles involved as to cause reversal absent that fact. Appellees' interpretation of the case implies that because there was a twenty year delay in commencing the interstate business, Alabama must have made a knowing and intelligent waiver. If that were true, we think the twenty year language would increase in significance. However, the argument is unpersuasive in light of Alabama's contention that the State did not intend to waive its immunity or know that such a waiver would result. Furthermore, even the dissent in *Parden* did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting Justices understood the majority to hold "that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." Under that rule, we think it sufficient that when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunity to the remedies provided in the Act. [*Id.* at 134 (omitting footnote)]

We are unpersuaded by the logic of the majority. We continue to rely on the authority of *Parden* and *Briggs*.

Arguments advanced by the Secretary of Labor as amicus curiae demonstrate practical support for a reversal

in this case as consistent with the congressional purpose underlying the 1966 FLSA amendments to attain a "minimum standard of living necessary for health, efficiency, and general well being of workers . . . with all deliberate speed consistent with the policy of the Act and the welfare of the American people." 2 U.S. Cong. and Admin. News, 1966, at p. 3004.

The Secretary advises:

> To the already vast coverage of the Act, the 1966 amendments added some 11.3 million employees in 657,000 establishments. Of this increase, 2.7 million employees and 119,000 establishments were in the sector of local government employment. (Secretary's Report to the 92nd Congress under Section 4(d), FLSA 1971, Tables 29 and 35).

The sheer magnitude of the enforcement burden which has been extended to forty-six million employees and almost two million establishments and the practical impossibility of investigating more than four percent of these businesses per year, *Hodgson* v. *Ricky Fashions*, 434 F.2d 1261, 1263, note 2 (5th Cir. 1970), demonstrates the strong need for employees of a state, like those persons in private employment, to possess a right of action against their employer. A suit by a state employee under § 216(b) represents the only remedial provisions of the Act which assures him of the opportunity of having his claim presented to a court. The Secretary possesses discretion to sue under § 216(c) and § 217. The Secretary's interest may not be identical to the personal interests of an individual employee.

Accordingly, we would hold that to effectuate the purposes of extending FLSA coverage to employees of state government, the state by conducting the specific activities falling within the Act, constructively consents to suit by

its covered employees and waives its Eleventh Amendment immunity.

We would reverse and remand this case for further proceedings.

STEPHENSON, Circuit Judge, Dissenting.

I join the dissent, but I add a comment in order to make my position unmistakably clear.

I read *Parden* v. *Terminal Railway of Alabama, supra,* as authority for the proposition that a State is amenable to private suit in a federal forum under certain carefully defined circumstances. Accordingly, I cannot agree, in view of the still live holding of the Supreme Court in *Parden,* that this complaint is deficient as a matter of law. I think, contrarily, that it alleges facts which, if true, provide a basis upon which some relief conceivably could be granted. In this connection I note that the Court specifically recognized that "one or more of the remedies the Act provides might not be available when a State is the employer-defendant." *Maryland* v. *Wirtz, supra,* p. 200 of 392 U.S.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Employees of Department of Public Health & Welfare, State of Missouri et al., Appellants v. Department of Public Health & Welfare, State of Missouri et al., Appellees.

United States Court of Appeals, Eighth Circuit. No. 20,204. April 2, 1971.

On Appeal from United States District Court, Western District of Missouri.

Charles R. Oldham, St. Louis, Missouri, for Appellants.

John C. Craft, Assistant Attorney General, Jefferson City, Missouri, for Appellees.

Before VAN OOSTERHOUT and BRIGHT, Circuit Judges, and NEVILLE, District Judge.

[*Statement of Case*]

BRIGHT, C. J.: Plaintiffs, employees of several Missouri state institutions, brought this class action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, seeking to recover unpaid overtime compensation and additional amounts for liquidated damages and attorney's fees. The parties agree that the suit is primarily directed against the State of Missouri, and the plaintiffs further acknowledge that Missouri has never expressly consented to this suit. On motion by the State, the federal district court dismissed the action, concluding that the principles of sovereign immunity incorporated in the Eleventh Amendment bars federal judicial action on this suit. Plaintiffs prosecute this appeal from the judgment of dismissal. For reasons stated below, we reverse.

[*State as Employer*]

The State of Missouri operates schools and hospitals, the employees of which are now entitled to minimum wages and overtime compensation pursuant to the 1966 amendments to the Fair Labor Standards Act (FLSA). The Act gives an employee or employees a right of action "in any

court of competent jurisdiction" to recover amounts due from an employer who violates the minimum wage or overtime compensation provisions of the Act.[1] The issue presented on this appeal is whether Missouri has waived its Eleventh Amendment immunity to private suit within the context of the 1966 amendments to FLSA.

We first review briefly the statutory history of the Fair Labor Standards Act of 1938, and the 1966 amendments thereto. This legislation serves "to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Brooklyn Bank* v. *O'Neil*, [9 LC ¶ 51,197] 324 U. S. 697, 706 (1945). See 29 U. S. C. § 202. In its original form, the Act specifically excluded "any State or political subdivision of a State" from its definition of an "employer" subject to the provisions of the Act. In 1966, Congress extended the protection afforded by the Act to the employees of any institution or enterprise which

> is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physi-

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[1] 29 U.S.C. § 216(b). The Fair Labor Standards Act provides several remedies. In addition to granting employees a private right of action for their unpaid minimum wages or unpaid overtime compensation, they may also recover "an additional equal amount as liquidated damages" and may collect "a reasonable attorney's fee . . . and costs." *Id.* The Act also provides that upon written request by an eligible employee, "the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim . . . ." 29 U.S.C. § 216(c). However, the consent of an employee to an action by the Secretary of Labor constitutes "a waiver by such employee of any right [of action] he may have under subsection (b)." *Id.* The Secretary may also bring an action seeking injunctive relief against any employer violating the Act. 29 U.S.C. §§ 211(a), 217.

> cally handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit). [29 U. S. C. § 203(s)(4) (Supp. 1970)]

Congress also expanded the Act's definition of "employer" to include the States and their political subdivisions, thus affording the protection of the Act to state employees working in such hospitals, institutions and schools. 29 U. S. C. § 203(d) (Supp. 1970).

In *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), the Supreme Court held the 1966 amendments to constitute valid legislation enacted pursuant to the federal commerce power. The Court rejected the contentions of Maryland and other states that Congress' power over interstate commerce must yield to a state's sovereign immunity in the latter's performance of its governmental functions. Justice Harlan, speaking for the Court, observed:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. [392 U. S. at 197]

The Court, however, specifically reserved comment on the enforceability of any of the provisions of the Act through suits directed against the State. The majority stated:

> Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. Cf. *Parden* v. *Terminal R. Co.*, 377 U. S. 184. The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act

> provides might not be available when a State is the employer-defendant. Particularly in light of the Act's "separability" provision, 29 U. S. C. § 219, we see no reason to strike down otherwise valid portions of the Act simply because other portions might not be constitutional as applied to hypothetical future cases. At the same time, we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases. [392 U. S. at 200]

In dismissing plaintiffs-appellants' action, the district court relied upon a decision rendered by a federal district court in Utah dismissing a similar suit, one brought by state welfare department employees against the State of Utah for recovery of overtime compensation under the FLSA. *Briggs* v. *Sagers*, 301 F. Supp. 1023 (D. Utah 1969). However, the Tenth Circuit has now reversed that decision. *Briggs* v. *Sagers*, 424 F. 2d 130 (10th Cir.), *cert. denied*, 400 U. S. 829 (1970).

[*Waiver of Immunity*]

A suit such as this one, by resident state employees against the State, does not fall within the literal terms of the Eleventh Amendment which provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

The Supreme Court has construed this amendment to bar suits in federal court brought by a state's own citizens, as well as citizens from other states. *Hans* v. *Louisiana*, 134 U. S. 1 (1890).

Appellants contend that the State of Missouri has waived its Eleventh Amendment rights by continuing to operate the schools and hospitals knowing that the employees thereof are now afforded protection by the Fair Labor Standards Act. In urging a waiver of these rights, appellants rely primarily upon the Supreme Court's decision in *Parden* v. *Terminal Ry. Co.*, 377 U. S. 184 (1964), and the Tenth Circuit's ruling in *Briggs, supra*, 424 F. 2d 130.

In *Parden*, employees of an Alabama-owned railway brought an action in federal court against the state railway for personal injuries under the Federal Employers Liability Act, 45 U. S. C. §§ 51-60. Alabama contended that Congress lacked the constitutional authority to subject a state, without its express consent, to a private suit under the FELA because of the Eleventh Amendment guarantee. The Supreme Court concluded that the State's operation of a railroad in interstate commerce constituted a waiver of its sovereign immunity and a consent to be sued by its employees in federal courts under the FELA. The Court ruled in *Parden* that consent to suit rested upon conditions Congress attached to the states' action, and actual assent need not be given. In so ruling, the Supreme Court relied in part upon its earlier decision in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959), where the Court permitted a Jones Act claim against a bi-state authority created by an interstate compact.[2] The Court observed in *Parden:*

> Where a State's consent to a suit is alleged to arise from an act not wholly within its sphere of authority

[2] In *Petty* plaintiff brought an action under the Jones Act against an agency of the States of Tennessee and Missouri which had been created by a compact entered into between them with the

but from within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here, as in *Petty*, the States by venturing into the congressional realm "assume the conditions that Congress under the Constitution attached." 359 U. S. at 281-282. [377 U. S. at 196]

The Tenth Circuit applied the *Parden* doctrine in *Briggs*, *supra*, and rejected Utah's defense of sovereign immunity to a federal court suit under the FLSA by state employees. The court said:

> [W]e think the express intent of Congress and the language of *Parden* must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, *e.g.*, interstate commerce, is plenary as to those matters. Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments. To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation.
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consent of Congress. In approving the compact, Congress had attached a proviso that its approval should not be construed as affecting, impairing or diminishing federal court jurisdiction over matters arising under the compact. Interpreting these instruments under federal law, the Supreme Court determined that the States had consented to this kind of suit, although, under state law, the language of the compact would have preserved the States' immunity from any tort liability such as asserted by the plaintiff. 359 U.S. at 279-282.

> When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw. [424 F. 2d at 133-134 (footnotes omitted)]

[*Private Wage Suits*]

By application of the principle of *Parden* and *Briggs*, we reject Missouri's claim of Eleventh Amendment sovereign immunity. We think it clear that actual consent by a State is immaterial when a plaintiff sues a State upon a cause of action expressly created by Congress. The State's consent results from the interrelation of the activities of the State and regulations placed thereon by Congress. See generally *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

Appellees raise the following additional contentions in support of the trial court's dismissal of this action: (1) that Congress did not intend to subject the states to private suits for failure to comply with the FLSA standards, and (2) that *Parden* is inapplicable since an alternative to a private action exists here, i.e., suit through the federal administrator.

We comment on each of these contentions. Appellees contend that no direct legislative expression of intent concerning private suits against states under the FLSA can be found in the history of the 1966 legislation, and thus Congress did not intend to subject the states to such suits. While we agree that Congress did not clearly express an intent on this issue, the circumstances surrounding this legislation permit the inference that Congress did not intend to create rights for employees of a state without affording them a remedy. The Supreme Court, in *Parden*, rejected a similar contention.

In enacting the 1966 amendments to the FLSA, Congress explicitly placed certain state employees within the cover-

age of the Act. Congress adopted these amendments in the light of other provisions affording employees a right to collect compensation against an offending employer "in any court of competent jurisdiction". 29 U. S. C. § 216(b). We think its unreasonable to presume that Congress would have intended the Act's protection to cover state employees, and at the same time deny them an appropriate forum in which to enforce their rights. As the Supreme Court noted in *Parden:*

> [W]e should not presume to say, in the absence of express provision to the contrary, that it [Congress] intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy .... We are unwilling to conclude that Congress intended so pointless and frustrating a result. [377 U. S. at 190]

We reject the appellees' argument on this point.

Finally, we turn to appellees' suggestion that the rationale of *Parden* should not control and that this action should fail because the FLSA provides remedies other than by private suits for alleged violations of the Act. Appellees suggest that upholding the district court's order of dismissal will not leave the unpaid state employees without legal recourse since Congress has empowered a federal administrator to enforce the terms of the Act. Appellees apparently refer to the authority of the Secretary of Labor to bring an action under 29 U. S. C. § 216(c) on behalf of the employees, or the Secretary's power to seek injunctive relief under 29 U. S. C. § 217. See footnote 1, *supra.*

Appellees, however, offer no compelling reasons why these sections afford a more appropriate remedy than a private action by the employees against the State for violation of the Act. In fact, the Act's statutory scheme of enforcement seems to give preference to the individual's

private right of action. It specifies that: "Any employer who violates the provisions of [the Act] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . .", 29 U. S. C. § 216(b); but authorizes the Secretary to bring an action on behalf of an employee only "[w]hen a written request is filed." 29 U. S. C. § 216(c). Since we find no statutory basis to indicate that individual employees should forego any personal right of action against the state as an employer, we reject this argument.

Accordingly, on the authority of *Parden* and *Briggs*, we reverse and remand this case for further proceedings consistent with this opinion.

[Dissenting Opinion]

VAN OOSTERHOUT, C. J., dissenting: I would affirm the judgment of the District Court dismissing this case for want of jurisdiction by reason of sovereign immunity and the provisions of the Eleventh Amendment.

As pointed out in the majority opinion, a divided Supreme Court in *Maryland* v. *Wirtz*, 392 U. S. 183, upheld the constitutionality of the Fair Labor Standards Act as amended, extending coverage to employees of state institutions. The Supreme Court in its opinion recites that various methods of enforcement are provided by the Act. It specifically declines to pass upon the Eleventh Amendment immunity issue, stating "Questions of state immunity are therefore reserved for appropriate future cases." 392 U. S. 183, 200.

Here we are squarely confronted with the Eleventh Amendment immunity issue reserved in *Maryland* v. *Wirtz*. The majority opinion in our present case in denying the state Eleventh Amendment immunity relies largely on *Briggs* v. *Sagers*, 10 Cir., 424 F. 2d 130, and *Parden* v. *Terminal Ry. Co.*, 377 U. S. 184, which latter opinion was largely relied upon by the Tenth Circuit in Briggs.

The *Parden* majority recognizes the force of the Eleventh Amendment by language reading as follows:

> "Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overriden." 377 U. S. 184, 192.

The majority holds that the state in operating the railroad is engaging in interstate commerce by rail and necessarily consented to suits authorized by the Federal Employers Liability Act which was enacted by Congress under its interstate commerce powers. Mr. Justice White, speaking for himself and three other justices, states:

> "The majority today follows the Court's consistent holdings that an unconsenting State is constitutionally immune from federal court suits brought by its own citizens as well as by citizens of other States. It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another."
>
> • • •
>
> "In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171. See *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 468-470. If the automatic consequence of state operation of a railroad in interstate commerce is to be a waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment or

abandonment of a known right or privilege' which must be shown before constitutional rights may be taken to have been waived. *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Fay* v. *Noia*, 372 U. S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." 377 U. S. 184, 198, 199-200.

As pointed out in *Hans* v. *Louisiana*, 134 U. S. 1, the Eleventh Amendment was the prompt response to the decision of the Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, that states were subject to suits by individuals. See *Monaco* v. *Mississippi*, 292 U. S. 313, for a good background statement as to the historical importance of sovereign immunity.

Moreover, at the time the Eleventh Amendment was enacted the commerce clause was a part of the constitution. The prohibition of suits by individuals against the state is stated broadly in the Amendment. There is no language in the Amendment that expressly or impliedly excepts from its operation rights given the federal government under the commerce clause.

Governmental immunity from a suit not consented to as to states was written into the Eleventh Amendment and as to the United States, it is derived by implication. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 388.

In *Monaco* v. *Mississippi*, *supra*, at 322, the Court holds that apart from the Eleventh Amendment, "There is also the postulate that States of the Union, still possessing attributes of sovereignty shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" The Court then discusses the historical background of sovereign immunity and states:

"Protected by the same fundamental principle, the States, in the absence of consent, are immune from

suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment." 292 U. S. 313, 329-330.

With respect to waiver of sovereign immunity by the United States, the Supreme Court reads consent to jurisdiction provisions of the statutes restrictively. *Honda* v. *Clark*, 386 U. S. 484; *McMahon* v. *United States*, 342 U. S. 25; *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Shaw*, 309 U. S. 495. See *Peterson* v. *United States*, 8 Cir., 428 F. 2d 368.

Controlling legal principles and proper federal-state relations require that the standards applicable to federal immunity should be applied to the sovereign immunity of the states.

The claim of waiver of sovereign immunity in our present case appears to be based solely on the fact that the state continued to operate its hospitals and schools after the enactment of the amendment to the Fair Labor Standards Act. Many states deem it necessary to operate mental and other hospitals and schools in the public interest as a governmental function. The services of such facilities cannot be abruptly abandoned without seriously adversely affecting the public interest and welfare. The waiver situation here is clearly distinguishable from that in *Parden* where the operation involved was a railroad. Moreover, in *Parden* only actual damages were involved. In our present case, the claim is for double damages and attorneys' fees. The excerpt from *Maryland* v. *Wirtz* quoted by the majority reflects grave doubt as to whether the Act abrogated the Eleventh Amendment in an action such as this. I am not persuaded that the Supreme Court will extend the *Parden* waiver theory to the factual situation in this case.

I would affirm.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20204 September Term, 1971

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, A. Division of Mental Diseases: 1. State Hospital # 1, Fulton, Missouri, Garfield Branch, et al, *Appellants*,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE OF THE STATE OF MISSOURI, AUSTIN HILL, Director, Department of Public Health & Welfare, State of Missouri, et al., *Appellees*.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on for reargument and submission to this Court en banc after order of this Court of May 10, 1971, granting petition for rehearing en banc.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the prior judgment of this Court entered April 2, 1971, reversing the judgment of the District Court dismissing the complaint be, and is hereby vacated and set aside.

And it is further ordered by this Court that the judgment of the said District Court in this cause dismissing the complaint in this cause be and is hereby affirmed, in accordance with the majority opinion of this Court this day filed herein.

November 11, 1971

Order Granting Defendants' Motion To Dismiss: Judgment of Dismissal

(Filed in U. S. District Court January 27, 1970)

This is a suit under the Fair Labor Standards Act, Sections 201-219 of Title 29, United States Code. The plaintiffs state that they are employees of the defendant within the meaning of Section 203(e) of the same title who have worked more than 44 hours a week during the period of February 1, 1967, to January 31, 1968; more than 42 hours during the period of February 1, 1968, to January 31, 1969; and more than 42 hours during the period February 1, 1969; and they accordingly sue for time-and-a-half overtime pay in accordance with § 207(a)(2) of the above title, which overtime pay they state they have continually demanded of defendants, who have failed and refused to pay it. Plaintiffs also request an additional equal amount in liquidated damages.

The federal and state courts have consistently held that actions of this nature against on official or agency of the state in his official capacity are actions against the state itself. *Ford Motor Company* v. *Department of Treasury of the State of Indiana*, 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389; *Klekan* v. *Morris*, Mo., 247 S. W. 2d 832; *State ex rel. State Park Board* v. *Tate*, Mo. en banc, 295, S. W. 2d 167; *State ex rel. Eagleton* v. *Hall*, Mo. en banc, 389 S. W. 2d 798. The principle thus recognized is that of sovereign immunity, in accordance with the Eleventh Amendment to the United States Constitution.

In *Maryland* v. *Wirtz*, 292 U. S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020, the United States Supreme Court held that the Fair Labor Standards Act applied to state governments in certain circumstances, but specifically declined to determine whether a suit by an employer of the state against the state government under Section 216 (b) was permissible in light of the Eleventh Amendment's recognition of the principle of sovereign immunity.

The question specifically reserved in that case, however, has recently been decided in favor of the principle of sovereign immunity by the United States District Court for the District of Utah in the case of *Briggs* v. *Sagers* (D. Utah) — F. Supp. — (decided July 11, 1969). In that case, as in this one, state welfare department employees sued for overtime compensation.

There is no question of waiver of immunity under the pleadings in this case. Cf. *Parden* v. *Terminal Ry. Co.*, 377 U. S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233.

For the foregoing reasons, it is

Ordered that defendants' motion to dismiss be, and it is hereby granted. It is further

Ordered and Adjudged that this cause be, and it is hereby, dismissed.

WILLIAM H. BECKER
Chief Judge

Kansas City, Missouri

APPENDIX B

Constitutional and Statutory Provisions Involved

Article I, Sec. 8 of the Constitution of the United States provides in pertinent part:

> The Congress shall have power * * *,
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * * And
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.

The Eleventh Amendment of the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or Subjects of any Foreign State.

The Fair Labor Standards Act of 1938, as amended, provides in pertinent part:

> Sec. 3. As used in this Act—
>
> * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section * * *
>
> * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose * * * For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), * * * shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce * * * and which—

* * * *

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children * * * (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit.

* * * *

Sec. 16 * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their

unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 of this Act in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

(c) * * * When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled * * *.

Sec. 17.

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

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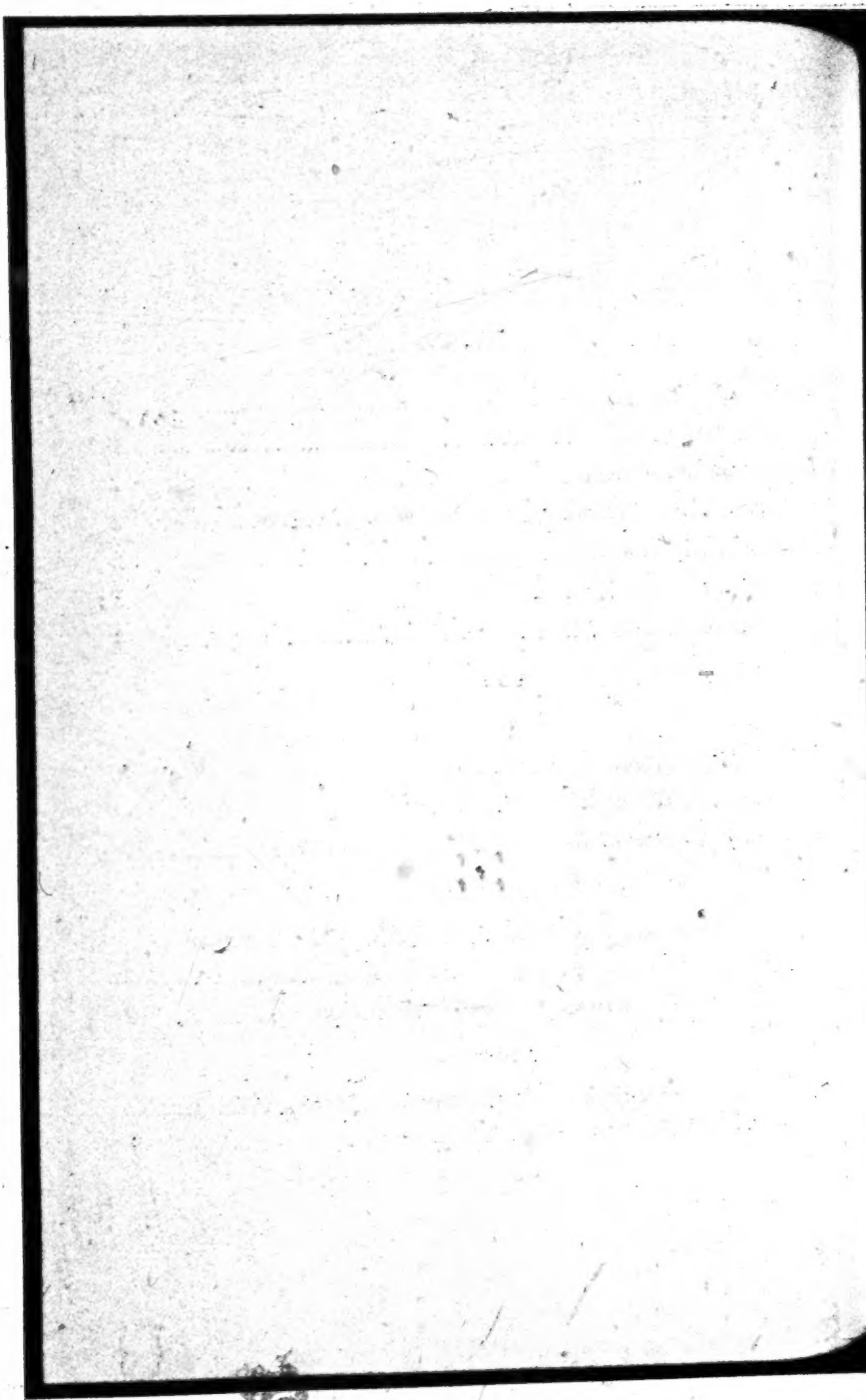

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE, STATE OF MISSOURI, et al.,
Petitioners,

vs.

DEPARTMENT OF PUBLIC HEALTH AND WELFARE, STATE OF MISSOURI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals en banc is as yet unreported. It is set forth with the dissenting opinions in Appendix A to the Petition for Writ of Certiorari at 1a-25a. The opinion of a three-judge panel of the Court of Appeals, prior to rehearing by the court en banc, is unreported and is set out in Appendix A of the Petition at 26a-37a. The order of the district court granting respondents' motion to

dismiss the complaint is also unreported and is printed in Appendix A of the Petition at 39a-40a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Congress in extending coverage of the Fair Labor Standards Act to employees of publicly owned schools and hospitals intended a state waive its immunity from suit in federal court as a condition of operating schools and hospitals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 3.

United States Constitution, Amendment XI.

The Fair Labor Standards Act as amended, Sections 3(d), (r), (s), 16(b), (c), and 17, 29 U.S.C. Section 203 et seq.

The text of these constitutional and statutory sections may be found in Appendix B of the Petition.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition is generally satisfactory. The majority opinion of the three-judge panel of the Eighth Circuit states that the parties agreed that the suit was primarily directed against the State of Missouri (Appendix A to the Petition at 27a). On rehearing before the Court of Appeals en banc, the petitioners stated in their reply brief that they ". . . do not contest the point that the state agencies and individuals named as defendants in this suit have available to them

the defense afforded to states under the doctrine of immunity set forth in the Eleventh Amendment . . ." (Appellant's Reply Brief, page 4).

While petitioners purport to maintain a class action suit, the court below found that the issue of whether there were members of the class other than the forty-eight individually named plaintiffs to be immaterial in view of its decision upholding dismissal of the complaint and expressed no opinion on that question. (Footnote 2 of the opinion, as reprinted in Appendix A of the Petition.)

ARGUMENT

The decision below is clearly correct.

Since *Hans* v. *Louisiana*, 134 U.S. 1 (1890), it has been settled law that the doctrine of sovereign immunity and the Eleventh Amendment bar suit in federal court by citizens of a state against that state.

In affirming the dismissal of the complaint, the court below merely reaffirmed the proposition that agencies of the State of Missouri cannot be sued by private citizens in federal courts.

The court below expressly recognized the possibility that Missouri could waive its immunity from suit in federal court. However, the court was convinced that Missouri had not waived that immunity in the instant action.

In reaching the conclusion that Missouri had not consented to suit in the federal court, the court acknowledged this court's decision in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964). However, the court found that the factual basis for waiver of immunity in the *Parden* case would have to be "enlarged and extended to fit the present case." That course the Eighth Circuit quite properly declined.

It has been suggested by the petitioners that the court below asserted a balancing test to determine whether the

Commerce Clause takes precedence over the Eleventh Amendment; and that such a test is in conflict with this court's holding in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). In fact, the language in the opinion below as to the relationship between the Commerce Clause and the Eleventh Amendment it as most dictum. The court found that Congress in extending coverage of the FLSA in 1966[1] to certain public employees did not intend that the states relinquish immunity from suit in the federal courts with respect to claims of covered employees arising out of that act. Since the court found no Congressional intent to subject states to suits under the FLSA, it did not have to decide the question of whether the Commerce Clause took precedence over the Eleventh Amendment.

In essence, the court below has merely reaffirmed the proposition that states are immune from suit in federal court; and, that the Fair Labor Standards Act evidences no intent on the part of Congress to diminish such immunity. That holding is clearly correct and amply supported in the opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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1. Fair Labor Standards Amendment of 1966, Pub. L. No. 89-601, 80 Stat. 830.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Petitioners,*

v.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit, on rehearing *en banc,* are reported at 452 F.2d 820; they are reprinted at pp. 1a-25a of the Petition for Certiorari.[1] The original majority and dissenting opinions of the Court of Appeals are reported at 19 Wage Hour Cases 1019; they are reprinted at Pet. 26a-37a. The

[1] The Petition for Certiorari will be referred to as "Pet."

opinion of the United States District Court for the Western District of Missouri is reported at 19 Wage Hour Cases 1018; it is reprinted at A. 9-10.[2]

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 11, 1971. (Pet. 38a). The Petition for Certiorari was granted on March 27, 1972. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress intended to authorize suits by employees of State-owned schools and hospitals against a State for wage claims under the Fair Labor Standards Act.

2. Whether, under *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184, a State is deemed to have waived its Eleventh Amendment immunity to citizen-employee suits by continuing to engage in activities to which Congress has extended the coverage of the Fair Labor Standards Act under its Commerce Clause power.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Article I, Section 8, Clause 3, and the Eleventh Amendment to the United States Constitution. The case also involves the Fair Labor Standards Act of 1938 Ch. 676, 52 Stat. 1060 *et seq.* as amended, particularly by Pub. L. 89-601, 80 Stat. 830, 29 U.S.C. §§ 201-219. The relevant provisions of that Act are §§ 3(d), (e), (r), (s), 6, 7, 16 and 17. These constitutional and statutory provisions are reprinted in Appendix A, *infra*.

[2] "A." refers to the Appendix in this Court.

STATEMENT OF THE CASE

This action was brought by Petitioners under § 16(b) of the Fair Labor Standards Act (hereafter sometimes referred to as "FLSA" or "the Act") to remedy violations of the maximum hours provisions of that Act (A. 2). One group of plaintiffs are employees of the Department of Public Health and Welfare of the State of Missouri; some of these are employed by the Division of Mental Diseases at five state mental hospitals; the others are employed by the Division of Health at a cancer hospital operated by the State. A second group of plaintiffs are employed by the State Board of Training Schools of the State Department of Corrections. (A. 3-4).[2] The defendants are the Department of Public Health and Welfare, the State Board of Training Schools, and various State Board members and officials having supervision of the state hospitals and training schools. The officials were sued in their official capacity and as individuals. (A. 2-3).

The complaint alleges that the plaintiffs are "employees" within the meaning of § 3(e) of the Fair Labor Standards Act and that they are entitled to the benefits of the maximum hours provision of § 7(a)(2) of the Act:

> "No employer shall employ any of his employees . . . for a workweek longer than 44 hours during

[2] The complaint alleges that the plaintiffs are and at all pertinent times have been members of the American Federation of State, County and Municipal Employees' Union, AFL-CIO, affiliated with Missouri State Council 72 of said Union, which is a Labor organization engaged in representing employees of various departments of the State of Missouri in regard to their wages, hours and working conditions. It is further alleged that the plaintiffs are bringing the action for themselves and for the benefit of other employees similarly situated as a class. (A. 4).

the first year from the effective date of the Fair Labor Standards amendments of 1966 [February 1, 1967 to and including January 31, 1968], for a workweek longer than 42 hours during the second year from such date [February 1, 1968 to and including January 31, 1969], or for a workweek longer than 40 hours after the expiration of the second year from such date [February 1, 1969, ad finitum], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

It is further alleged that between February 1, 1967, and August 1, 1969, the plaintiffs were required to work and did work in excess of the hours prescribed in § 7(a)(2), and that they were not compensated for those excess hours at a rate not less than 1½ times the regular rate at which they were employed, as § 7(a)(2) requires. (A. 5-6). They therefore allege that they had been unlawfully injured in the amount of overtime wages that they would have received but for the defendants' violations of the maximum hours provisions of the Act. (A. 6). They seek reimbursement of the unpaid overtime compensation, an additional amount equal to the sums due them as liquidated damages, and attorneys' fees, all as authorized by § 16(b) of the Act. (A. 6-7).

The only pleading filed in response to this complaint was a motion to dismiss filed by the State of Missouri. It was there asserted that the action was in reality against the State of Missouri, that the State had not consented to suit or waived its sovereign immunity, and that therefore the Eleventh Amendment deprived the court of jurisdiction. (A. 7-8). This position was sustained by the District Court in a brief order dis-

missing the complaint on the ground that the State was protected by sovereign immunity. (A. 9-10).

Plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. On the original hearing, a panel of that court reversed the District Court and reinstated the complaint. The majority held, in accord with the Tenth Circuit's decision in *Briggs* v. *Sagers*, 424 F. 2d 130, cert. denied, 400 U.S. 829, that the State had waived its sovereign immunity by operating schools and hospitals in interstate commerce. (Pet. 26a-34a). Judge Van Oosterhout dissented. (Pet. 34a-37a). Both the panel majority (Pet. 32a), and the unanimous *Briggs* court (424 F. 2d at 132), considered the issue to be controlled by *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184. The State filed a Petition for Rehearing *en banc* which was granted. Further briefs were thereafter filed by the parties, and the Department of Labor submitted a brief *amicus curiae* in support of plaintiffs' position. The full court, with Judge Van Oosterhout now writing the majority opinion, set aside the panel decision and affirmed the judgment of the District Court. (Pet. 1a-12a). The majority concluded:

> "The factual distinctions between our present case and *Parden* are such as to satisfy us that the *Parden* waiver of sovereign immunity holding should not be extended to and applied in the present situation. We are convinced that the State has not waived its sovereign immunity or consented to be sued in an action by its hospital and training school employees for overtime compensation under § 216(b)." (Pet. 12a)

Four judges joined in a dissenting opinion by Judge Bright (Pet. 12a-25a) and Judge Stephenson also filed a separate dissenting opinion. (Pet. 25a).

SUMMARY OF ARGUMENT

In 1966 Congress amended the Fair Labor Standards Act to cover employees of certain State schools and hospitals. This was held to be a proper exercise of the Congressional power under the Commerce Clause in *Maryland* v. *Wirtz*, 392 U.S. 183. This case presents the question, expressly reserved as unnecessary to decision in *Maryland* (*id.* at 199-200), whether employees may sue in federal court to vindicate rights established by the 1966 amendments. Petitioners submit that Congress intended to subject States to employee suits for violations of the FLSA and that it was within Congress' power to do so, notwithstanding the Eleventh Amendment.

I

This suit is expressly authorized by § 16(b) of the FLSA, which provides: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction. * * *" The term "employer", which is defined in § 3(d), includes the States when they operate an "enterprise" as defined in § 3(r); that term in turn encompasses schools and hospitals of the kind involved in this case. The present definitions in § 3(d) and § 3(r) were adopted in 1966; it was by virtue of these changes, and a related change in § 3(s), that the States, which had previously been

excluded entirely, were brought under the Act with respect to schools and hospitals.

In their brief in *Maryland* v. *Wirtz*, the appellant States, including Missouri, expressed their understanding that § 16(b) now authorizes suits against the States. This reading is inescapable, given the clear language of § 16(b), and Congress' deliberate expansion of the critical word "employer". Missouri's present contrary contention is wholly without support in the legislative history. In so far as they are at all pertinent, the Congressional debates and reports show that exempting the States from § 16(b) would have defeated the objectives of the 1966 amendments. Coverage was expanded in order to carry forward the original policy of the Act "to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The § 16(b) remedy not only protects employees by affording them the opportunity to protect their own legal interests, but is essential "to insure restoration of the worker to th[e] statutory minimum standard of well-being", for "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708. The reports also show that in order to avoid "unfair competition" States and private parties were to be treated identically in their operation of schools and hospitals. To effectuate this policy of "uniformity" the § 16(b) remedy must be available against all covered employers. *Brooklyn Savings Bank*, 324 U.S. at 710.

II

The present suit is not barred by the Eleventh Amendment. The controlling precedent is *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184. It was there held that Congress has power under the Commerce Clause to require a State to waive its sovereign immunity as a condition of engaging in interstate commerce. "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." *Id.* at 192. Although the Court was divided in deciding that the FELA subjects the States to private suits, it was unanimous on this constitutional issue. The dissenting justices agreed "that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198.

The *Parden* doctrine is fully applicable here. *Maryland* v. *Wirtz*, *supra*, establishes that application of the FLSA to State schools and hospitals is a valid exercise of the Commerce power. The § 16(b) remedy is in aid of that regulation. It matters not, as the court below thought, that *Parden* involved State railroads whereas this case involves State schools and hospitals whose discontinuance "would seriously adversely affect the public interest and welfare of the State." (Pet. 9a-10a). Both the result and the

reasoning in *Maryland* v. *Wirtz* establish that State concerns cannot "constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. 195-196.

The court below thought that "*Parden* is distinguishable from our present case in four respects." None of these distinctions is tenable:

1) The result in *Parden* did not depend on the absence of alternative remedies to private employees suits. Rather, the principle there announced rested on Congress' broad power to regulate commerce, which extends to formulating remedies for violation of its regulations. Section 16(b) is "an important weapon" (377 U.S. at 198) for the enforcement of the FLSA. The alternative remedies provided are not adequate substitutes for, but rather complement, § 16(b) in the burdensome task of enforcing the FLSA against almost two million enterprises. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707-712; *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, 139 (C.A. 2); *Hodgson* v. *Wheaton Glass Co.,* 446 F. 2d 527, 529-522 (C.A. 3).

2) The court below characterizes the double damages provision of § 16(b) as a "penalty" and held that Congress could not "punish" a State. Yet this Court has squarely held that § 16(b) is not a penalty, but merely provides for liquidated damages which make the employee whole for the unlawful retention of his earnings. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 707-708; *Overnight Motor Transport Co.* v. *Missel,* 316 U.S. 572, 583-584.

3) The *Parden* precedent cannot be avoided by characterizing State schools and hospitals as "govern-

mental functions" and State operation of a railroad as "proprietary". This distinction has repeatedly been discredited, most recently in *Maryland* v. *Wirtz*, 392 U.S. at 195. It was aptly criticized by Mr. Justice Frankfurter as "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co.* v. *U.S.*, 350 U.S. 61, 68, followed in *Rayonier, Inc.* v. *U.S.*, 352 U.S. 315, 319.

4) Finally, the authority of *Parden* cannot be escaped on the ground that the States operated schools and hospitals before the FLSA was applied to them whereas the FELA had long been in effect when Alabama began to operate its railroad. Such a distinction would "carve up the commerce power" (cf. *Maryland* v. *Wirtz*, 392 U.S. at 198) by denying Congress the power to establish the effective date of regulations of commerce. Moreover, as is recognized in *Briggs* v. *Sagers*, 424 F. 2d 130, 134 (C.A. 10), this distinction is premised on the necessity of "a knowing and intelligent waiver" by the State, but the *Parden* result by no means depends on the States' conscious choice. Rather, the waiver results from the States' conduct in engaging in interstate commerce which has been regulated by Congress. As was said in *Parden*, "the States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.'" 377 U.S. at 196.

ARGUMENT

INTRODUCTION

In 1966 Congress amended the Fair Labor Standards Act to bring within its coverage any enterprise which has employees engaged in commerce and which is

> "engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)."[4]

In *Maryland* v. *Wirtz*, 392 U.S. 183, 28 states, including Missouri, challenged the constitutionality of this expansion insofar as it affected hospitals and schools operated by States and their political subdivisions. This Court sustained the law as a proper exercise of Congress' power under the Commerce Clause. The Court held that "labor conditions in schools and hospitals can affect [interstate] commerce" (*id.* at 194) and that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved." *Id.* at 196-197. The present action by employees of Missouri schools and hospitals is brought to enforce the rights to overtime compensation established by Congress in the 1966 amendments to the FLSA and confirmed by this Court in *Maryland*. As *Maryland* was a declaratory judgment action brought by the States, it was unnecessary for this Court to decide whether such an action will lie, see *id.* at 199-200, but the issue is squarely presented here and in-

[4] Section 3(s)(4) of the Act.

volves two subordinate questions: (1) Did Congress subject the States to employee suits for unpaid minimum wages or overtime compensation? (2) Did Congress have power to do so, notwithstanding the Eleventh Amendment to the United States Constitution?

I. Section 16(b) of the FLSA Authorizes Private Suits Against the States.

As a result of the 1966 amendments, the Fair Labor Standards Act expressly authorizes suits by employees against States to recover monetary compensation for violations of the Act. That authorization is granted in § 16(b), which provides, in immediately pertinent part, as follows:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ."

The term "employer"—which describes the persons liable for violations of §§ 6 and 7 and who are subject to suit—is defined in § 3(d) of the Act:

> "As used in this Act—* * *
>
> (d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (*except with respect to employees of a State, or a political subdivision*

thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, * * *)"* (emphasis supplied)

The "except" clause was added in 1966. Prior thereto, the definition of "employer" had excluded States and their political subdivisions entirely from the definition of "employer" and hence from coverage under the Act. Section 3(r), to which § 3(d) refers, defines "enterprise", and was amended at the same time to include:

> "the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (*regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)* * * *." (Emphasis supplied).

The identical language was also added to subsection 3(s) which defines "enterprise engaged in commerce or the production of goods for commerce." These intermeshing changes in definition were sufficient to bring States fully under the Act in their operation of such schools and hospitals, since "employer," "enterprise" and "enterprise engaged in commerce or the production of goods for commerce" are the terms utilized in § 6 (minimum wages) and § 7 (maximum hours) to declare who is subject to their respective requirements.

Thus, § 16(b) clearly allows suits to be brought against States which operate schools and hospitals as defined in § 3(r) on behalf of employees who have not

received the compensation required by the Act. Indeed, in *Maryland* v. *Wirtz, supra,* Missouri and the other 27 appellant States said:

> "Sections 206 and 207 [of 29 U.S.C.—§§ 6 and 7 of the Act] to which Section 16(b) refers, contain the minimum wage and premium overtime provisions. The effect of Section 16(b) therefore, is to render the States liable to suit and judgment in federal and State courts by their employees."[5]

Nevertheless, Missouri argued below that the "legislative history does not reveal that the Congress necessarily intended to require the states to waive their immunity if they continued to operate the institutions whose employees are now covered."[6] Since, as we have shown, § 16(b) by its terms unmistakably subjects the States to suit, Missouri's position could be sustained, if at all, only by a compelling showing from the legislative history. But there is nothing whatsoever in that history which even raises the possibility that the amended definition of "employer" in § 3(d) was not to govern the meaning of that word in § 16(b).

What the pertinent legislative materials do reveal is that an intention to excuse the States from employee suits cannot realistically be attributed to Congress, since it would be inconsistent with Congress' overall purpose in bringing the States under the Act. Two Congressional objectives appear: 1) The inclusion of the States was part of a general expansion of coverage in furtherance of the original policy of the Fair

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[5] Brief of Appellants, No. 742, Oct. Term 1967, p. 74. It was on this basis that the States argued that "Public Law 89-601, or at least the sections thereof which authorize suits against the States, is in contravention of the Eleventh Amendment and therefore void." *Id.*, at p. 79.

[6] Brief of Appellees in the court below, p. 16.

Labor Standards Act of 1938 "to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"[7]; and 2) States were to be treated, in the operation of covered schools and hospitals, exactly like private parties which operate such institutions.[8]

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[7] S. Rep. 1487, 89th Cong. 2d Sess. p. 1.

[8] "In addition to the amendment to section 3(s) of the Act, section 3(r), which defines 'enterprise,' is amended so as to bring under the coverage of the Act employees of hospitals and related institutions, schools for mentally handicapped or gifted children, or institutions of higher education, regardless of whether any of these hospitals, schools, or institutions are public or private or operated for profit or not for profit. These enterprises which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the Act, the elimination of conditions which 'constitute an unfair method of competition in commerce.' Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises. A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living." H. Rep. No. 1366, 89th Cong., 2d Sess., pp. 16-17 (1966).

The § 16(b) remedy is indispensible to achieve both these objectives. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, the leading case on § 16(b), teaches that it is "an enforcement provision" (*id.* at 709), which enables employees to supplement the Government's limited resources in bringing violators to book, and deters violations by subjecting defaulting employers to the threat of double damages. (See *id.* at 709-710, quoted at p. 28 *infra*.) Further, it offers employees the opportunity to protect their own legal interests and to recover an award "to insure restoration of the worker to th[e] statutory minimum standard of well-being", for "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." (*Id.* at 707-708).[9]

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[9] In the only comment on § 16(b) during the debates on the original Act, Rep. Keller said:

> "Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. The provision has the further virtue of minimizing the cost of enforcement by the Government. It is both a common-sense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act." 83 Cong. Rec. 92641 (1938) quoted 324 U.S. at 705, n. 16.

Moreover, the *Brooklyn Savings Bank* case also shows that availability of the § 16(b) remedy against the States is necessary to assure equality between them and the other operators of schools and hospitals:

> "Prohibition of waiver of claims for liquidated damages [under § 16(b)] accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor." 324 U.S. at 710.

Since the policy of "uniformity" requires that no employer subject to the Act be relieved of the liquidated damages provided by § 16(b), it follows *a fortiori* that no employer can be excused from the whole of § 16(b).

Section 16(b) has from the beginning[10] gone hand in

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[10] Although the remedial provisions were materially revised in 1949 and again in 1961, and the Act as a whole has frequently been reexamined by Congress, the employee suit has been preserved intact since 1938. The sole significant exception is the last paragraph of § 16(b) which was added in 1961, to avoid duplication of remedies: This provides that the right to bring suit on behalf of an employee under § 16(b) shall terminate when the Secretary of Labor files suit under § 17 (as simultaneously amended) to restrain the withholding of compensation due to such employee. See Conf. Report No. 327, 87th Cong., pp. 19-20. As there explained, the "filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff before the Secretary's action." *Id.* at 20. Thus, the suit brought by the Secretary of Labor against Missouri with respect to hospitals at which some of the plaintiffs-petitioners herein are employed, and to which reference is made in the opinion below (Pet. 9a, n. 4) does not affect the present case.

hand with the substantive requirements of the FLSA to effectuate its policies. As succinctly stated in *Brooklyn Savings Bank:*

> "The provisions of the statute reflect the policy considerations discussed above which prohibit waiver of the right to liquidated damages. Sections 7(a) and 16(b) are mandatory in form. In terms they direct that the employer shall not employ a worker longer than the specified time without payment of overtime compensation and that upon violation of this provision, the employer shall be liable for statutory wages and liquidated damages. One section, Section 16(b), creates the obligation for the entire remedy. Collection of both wages and damages is left to the employee." 324 U.S. at 710-711.

In sum, when Congress extended the Fair Labor Standards Act to State employees, it was not enough to declare that they be paid according to the standards established in §§ 6 and 7; in order to assure these employees full protection it was necessary also to make available to them the remedy provided by § 16(b). Congress achieved both results in one stroke—by amending § 3(d) to include States as "employers".

2. The Present Suit Does Not Violate the Eleventh Amendment.

As we have shown, § 16(b) of the FLSA does authorize private suits against States to remedy violations of the Fair Labor Standards Act. But Missouri argues, and the court below agreed, that the Eleventh Amendment bars such a suit. We submit that this position cannot be sustained, for it is contrary to the constitutional principle declared in *Parden* v. *Terminal Railway of the Alabama State Docks Department,* 377 U.S. 184.

In *Parden*, employees of a railway owned by the State of Alabama brought an action in federal court against the railway to recover damages for personal injuries under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60. Alabama contended that because of the Eleventh Amendment Congress lacks the constitutional authority to subject a State to a private suit under the FELA without its express consent. This Court concluded, first, that Congress intended to subject States to suit under the FELA, and, second, that Congress has power, under the Commerce clause, to require a State to waive its sovereign immunity as a condition of engaging in interstate commerce. While four Justices disagreed with the majority's interpretation of the FELA, the Court was unanimous on the issue of congressional power. The heart of the Court's opinion was its determination that Congress' power to regulate interstate commerce encompasses the authority to require a State to waive its sovereign immunity as a condition for engaging in interstate commerce.

> "Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce. *Second Employers' Liability Cases*, 223 U.S. 1. While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty,' *Great Northern Life Ins. Co.* v. *Read, supra*, 322 U.S. 47, 51, the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
>
> 'This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sov-

ereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196-197.

Thus, as the Court said in *United States* v. *California, supra*, 297 U.S. at 184-185, a State's operation of a railroad in interstate commerce

'must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . . [T]here is no such limitation upon the plenary power to regulate commerce [as there is upon the federal power to tax state instrumentalities]. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.'

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.

"Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden.

It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit. '[By] engaging in interstate commerce by rail, [the State] has subjected itself to the commerce power, and is liable for a violation of the . . . Act, as are other carriers. . . .' *United States* v. *California, supra,* 297 U.S., at 185; *California* v. *Taylor, supra,* 353 U.S., at 568." 377 U.S. at 190-193, footnotes omitted.

And, on behalf of the minority, Mr. Justice White wrote:

"I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby." *Id.* at 198.

It is undisputed that Congress enacted the FLSA, like the FELA, "in the exercise of its constitutional power to regulate interstate commerce." *Id.* at 190-191. And *Maryland* v. *Wirtz*, 392 U.S. 183, established that just as the FELA could validly be extended to state railroad carriers, Congress was empowered by the Commerce Clause to extend the FLSA to state-owned schools and hospitals. It therefore necessarily follows from *Parden* and *Wirtz* that Congress could constitutionally require the States to waive their immunity to suit as a condition of operating schools and hospitals. To borrow this Court's language in *Parden*, "By adopting and ratifying the Commerce Clause, the States empowered Congress to create [the § 16(b)] right of action against [schools and hospitals]; by enacting the [FLSA] in the exercise of this power, Congress conditioned the right to operate [schools and hospitals] in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a [school or hospital] in interstate commerce, [Missouri] must be taken to have accepted that condition and thus to have consented to suit." Cf. 377 U.S. at 192.

Thus, after *Parden* and *Wirtz* it cannot properly be said, as the court below said, that "serious doubt exists whether Congress could by express and appropriate language provide that a State by continuing to operate essential government functions, such as here involved, would lose its constitutionally guaranteed sovereign immunity." (Pet. 9a.) Nor is there any occasion for "balancing of rights under the Commerce Clause against the right of the State's sovereign immunity," much less for concluding that "the well-recognized constitutional guarantee of sovereign immunity should prevail." (*Id.*) For it was agreed by all the Justices

in *Parden* that the State's sovereign immunity cannot prevail if Congress, in the exercise of its commerce power, chooses to effect a waiver of that immunity as a condition to the State's engaging in commerce. And in *Maryland* v. *Wirtz* the Court dismissed as "simply * * * not tenable" the argument that certain State functions are so essential that they are outside the commerce power although they partake of interstate commerce. 392 U.S. at 195. As Mr. Justice Harlan explained:

> "There is no general doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.' *Case* v. *Bowles*, 327 U.S. 92, 101.
>
> "In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. As long ago as *Sanitary District* v. *United States*, 266 U.S. 405, *the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce.* Congress had imposed statutory limits on the diversion of water from Lake Michigan. A unanimous Court, speaking through Mr. Justice Holmes, declared that the sanitary district's alleged need for more water than federal law allowed was 'irrelevant' because federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants.' Id., at 426. See *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508]". 392 U.S. at 195-196 (emphasis supplied).

We do not doubt that "discontinuance of the State mental hospitals for those needing care and unable to [illegible] and the discontinuance of the [illegible]

would seriously adversely affect the public interest and welfare of the State." (Pet. 9a-10a). But both the result and the reasoning in *Maryland* v. *Wirtz* establish that the importance of the State activity in no way detracts from Congress' power to regulate it if that activity is in interstate commerce:

> "The principle of *United States* v. *California* [297 U.S. 175, 183-185] is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of 'Commerce,' and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199.[11]

The court below also asserted that "nothing in the 1966 amendment to the Fair Labor Standards Act or in its legislative history * * * fairly informs the State that it will lose its constitutionally granted sovereign immunity by continuing to operate its hospitals and training schools," and that therefore "the State at no

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[11] State operation of schools was held to be subject to the commerce power also in *Board of Trustees* v. *United States*, 289 U.S. 48, followed in *Maryland*, 392 U.S. at 198, and to the war power in *Case* v. *Bowles*, 327 U.S. 92. Most recently, in *Wisconsin* v. *Yoder*, 92 S. Ct. 1526, the Chief Justice wrote for the Court: "Providing public schools ranks at the very apex of the functions of a State." *Id.* at 1532. Yet, the Court held once again that the exercise of this function was subordinate to the Constitution—there the Free Exercise Clause of the First Amendment.

time knowingly and intelligently waived its sovereign immunity defense to the present action." (Pet. 10a). The identical line of reasoning was unsuccessfully advanced by the dissenting justices in *Parden:*

> "In previous opinions the Court has indicated that waiver of sovereign immunity will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171. See *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 468-470. If the automatic consequence of state operation of a railroad in interstate commerce is to be waiver of sovereign immunity, Congress' failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment or abandonment of a known right or privilege' which must be shown before constitutional rights may be taken to have been waived. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Fay* v. *Noia*, 372 U.S. 391. The majority in effect holds that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent." 377 U.S. at 199-200, footnote omitted.[12]

The dissenting Justices in *Parden* were clearly correct in reading the majority opinion as holding that

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[12] In *Parden* there was room for argument as to whether the FELA applies to state-owned railroads because they were not mentioned expressly in that statute. In the view of the dissenting Justices, this brought into play the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect," 377 U.S. at 199 citing *United States* v. *Mine Workers*, 330 U.S. 258, 272. The dissent observed further that "the legislative history of the Federal Employers' Liability Act indicates that Congress did not even consider the possible impact of its legislation upon state immunity from suit." 377 U.S. at 199. But given the fact that Congress explicitly amended the FLSA in 1966

the waiver of sovereign immunity "need be neither knowing nor intelligent." *Id.* Waiver does not come about by the State's express choice. Rather it is implied as a matter of federal law from the State's conduct:

> "The States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.'" 377 U.S. at 195-196, quoting *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-282.

The Court of Appeals' treatment of the constitutional issue is therefore wholly at odds with this Court's holdings, specifically in *Parden* and *Maryland*. Moreover, none of the four "factual distinctions" which the Court advanced to differentiate this case from *Parden* is a tenable basis for avoiding that precedent. We shall deal with each of the four points separately, and for convenience shall in each instance set out the Court of Appeals' reasoning before responding thereto.

> "(1) In *Parden* the Court states, 'It would be even more surprising to learn that the FELA does make the Terminal Railway 'liable' to petitioners, but, unfortunately, provides no means by which that liability may be enforced.' 377 U.S. 184, 197.

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to cover the States, no such doubts are justified here. See pp. 12-18, *supra*. Moreover, since *Parden* had been decided two years previously, the States were aware—as Alabama had not been before *Parden*—that, the effect of these amendments was to condition the States' continued operation of hospitals and schools on their waiver of sovereign immunity, unless regulation of State schools and hospitals was wholly beyond the commerce power. The 28 plaintiff States in *Maryland* v. *Wirtz* fully understood that the Act subjected them to suit. See text and note at p. 14, n.5 *supra*.

"The *Wirtz* Court specifically recognized that remedies other than those provided in § 216(b) are available. Such remedies are provided for in the form of actions by the Secretary under §§ 216(c) and 217. Suits by State employees for injunctive relief may be available against State officials in their individual capacities under *Ex parte Young*, 209 U.S. 123." (Pet. 10a).

The court below apparently believed that the unavailability of alternative remedies was necessary to the holding in *Parden;* but this reading is incorrect. In the passage which immediately follows the single sentence quoted below this Court explained that it was essential that in regulating interstate commerce Congress must have power to authorize suits by private persons:

"Moreover, [upholding the Eleventh Amendment defense] would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. * * * In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." *Id.*, at 197-198.

The private suit authorized by § 16(b) is no less "an important weapon" in the enforcement of the FLSA than the suit for damages is under the FELA. As we have already seen, this was fully understood in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. The unique utility of the § 16(b) remedy is there described:

> "The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized, the Administrator was given limited enforcement powers. Criminal prosecution was available only for willful violations—difficult to prove. Section 16(a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring an action at law to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under Section 16(b). Although this right to sue is compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid. To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify the deterrent effect which Congress plainly intended that Section 16(b) should have. Knowledge on the part of the employer that he cannot escape liability for liquidated damages by taking advantage of the needs of his employees tends to insure compliance in the first place." *Id.* at 709-710, footnotes omitted.

Neither of the remedies available to the Secretary of Labor, and relied on by the court below possesses the characteristics which makes § 16(b) such a valuable tool for enforcing the Fair Labor Standards Act. The desirability of allowing suits for reimbursement by both the Secretary (then the Administrator of the Wage and Hour Division) and the affected employees were well stated in *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137 (C.A. 2):

> "Properly to safeguard these two [public and private] interests may well require the two remedies which are at most an inconvenience to the violating employer and not beyond the legislative power. To grant an exclusive remedy to the Administrator without a staff adequate to procure redress of all wrongs, or to the employees, many with too small claims to justify prosecution, would tend to limit or at times to nullify enforcement." *Id.* at 139.

The precise holding of *Scerbo* was that in a suit under § 17 as it then stood, the court could issue an injunction requiring the payment of wages which had been unlawfully withheld. Congress originally disapproved this result, and adopted § 16(c) which authorized the Secretary to sue for monetary reimbursement only in cases other than those involving "an issue of law which has not been finally settled by the courts."[12] In 1961 Congress changed its mind and amended § 17 to its present form, authorizing the Secretary to seek "the restraint of any withholding of minimum wages

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[12] "Thus," as this Court subsequently observed, "presumably Congress felt that the Secretary should not lend his weight to, not be burdened with, actions for unpaid wages except in the clearest cases." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 294.

or unpaid overtime compensation found to be due to employees."[14] "The effect of the amendment of § 17 is to restore fully the *Scerbo* remedy". *Hodgson* v. *Wheaton Glass Co.*, 446 F. 2d 527 (C.A. 3).

This change was responsive to the need to *strengthen* the enforcement process, particularly because of the vast increase, since 1938, in the employees and enterprises covered by the Act. See Sen. Rpt. No. 145, pp. 39-40 (1961).

As the dissenting Judges in the court below observed:

> "The sheer magnitude of the enforcement burden which has been extended to forty-six million employees and almost two million establishments and the practical impossibility of investigating more than four percent of these businesses per year, *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261, 1263, note 2 (5th Cir. 1970), demonstrates the strong need for employees of a state, like those persons in private employment, to possess a right of action against their employer. A suit by a state employee under § 216(b) represents the only remedial provisions of the Act which assures him of the opportunity of having his claim presented to a court. The Secretary's interest may not be identical to the personal interests of an individual employee." (Pet. 24a)

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[14] At the same time, Congress amended § 16(b) to avoid duplication of remedies, (see p. 17, n.10 *supra*), and added a statute of limitations. See *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 533 (C.A. 3). That case comprehensively discusses the evolution of the Act's remedial provisions. It is there pointed out that the § 16(c) remedy, on which the court below also relied in this case, "is for all practical purposes a dead letter" in light of the 1961 amendments. "It is hard to imagine a situation in which the Secretary would elect to proceed under § 16(c) rather than under § 17." 446 F.2d at 532.

Once it is appreciated that Congress has painstakingly developed a scheme of complementary private and public remedies to surmount the difficulties in enforcing the Fair Labor Standards Act, it becomes evident that *Parden* cannot be distinguished merely because § 16(b) is not the exclusive remedy for violations of that Act. Under the principles declared in *Parden*, Congress cannot be "hindered in the exercise of its constitutional power" by imposing on it an election of the remedies which it may establish "with respect to * * * regulable conduct." 377 U.S. at 198.

We turn now to the second distinction of *Parden* advanced by the court below:

> "(2) The remedy sought in *Parden* did not include double damages. Section 216(b) permits double damages and allowance of attorney's fees. It cannot reasonably be inferred from the statute and its legislative history that Congress intended to impose such penalties on sovereign States. * * *
>
> "To permit a federal court to punish a State by awarding double damages is inconsistent with the well-entrenched doctrine of sovereign immunity and the historical background of such immunity." (Pet. 10a-11a) [15]

We need not pause to consider whether, as the court below assumed, Congress would be constitutionally barred from imposing a "penalty" on States. For it

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[15] The foregoing quotation omits the court's discussion of the Secretary of Labor's suggestion that consideration of the penalty issue is premature in this case because the trial court might exercise his discretion under 29 U.S.C. § 260 to relieve the defendant of liquidated damages. The court below disagreed with the Secretary because "it cannot be said that there is any certainty that a federal court will make the finding required by § 260, or if such finding is made, that it would be an abuse of discretion for the court to allow double damages." (Pet. 11a). This is true. Moreover, as explained in the text, the provision for liquidated damages in § 16(b) presents no substantial difficulty.

is well settled that the § 16(b) remedy is not a "penalty." Here again, *Brooklyn Savings Bank* v. *O'Neil*, *supra*, is directly in point:

> We have previously held that the liquidated damage provision is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572. It constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being. Employees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." 324 U.S. at 707-708, footnotes omitted.[16]

Accordingly, imposition of double damages would not "punish" (Pet. 11a) respondent; it would simply make petitioners whole, as provided by Congress.

The third distinction advanced below is likewise foreclosed by precedent:

> "(3) The *Parden* majority states: 'But when a State leaves the sphere that is exclusively its

[16] In the *Overnight Motor Transp.* case this Court had said:

> "The liquidated damages for failure to pay the minimum wages under section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." 316 U.S. at 583, footnotes and citations omitted.

own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.' 377 U.S. 184, 196. The operation of the railroad in *Parden* is a proprietary function which could reasonably be considered as a departure by the State from a sphere that was exclusively its own. The operation of the mental hospitals and training schools in our present case is a governmental function. Hospitalization of a substantial number of mental patients is required for the protection of the public as well as the patients.

"The State has no realistic option open to it to discontinue its mental hospitals and training schools forthwith." (Pet. 11a-12a)

The foregoing illustrates all too well, we submit, the failure to respect this Court's precedents which mars the decision below. For the "governmental-proprietary" distinction has been discredited in this Court at least since 1936 when *United States* v. *California*, 297 U.S. 175, was decided.[17]

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[17] In *Case* v. *Bowles*, 327 U.S. 92, it was argued that the Emergency Price Control Act, 56 Stat.. 640, could not be applied to a sale of timber by the State of Washington "because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" *Id.* at 101. The argument was unsuccessful:

"Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioners' argument is that the extent of that power as applied to state functions depends on whether these are essential to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field

Thus, when the State argued in *Maryland* v. *Wirtz* that precedents which had sustained the Congressional power to regulate state-owned railroads did not extend to state-owned schools and hospitals,[18] Mr. Justice Harlan's response for this court was unequivocal:

> "In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." 392 U.S. at 195.

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here involved. Cf. *United States* v. *California, supra*, 297 U.S. at pages 183-185." 327 U.S. at 101.

Indian Towing Co. v. *United States*, 350 U.S. 61, rejected the contention of the United States that its waiver of immunity in the Federal Tort Claims Act, 28 U.S.C. § 1346(b), does not extend to "uniquely governmental functions." On behalf of the Court Mr. Justice Frankfurter responded:

> "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in mind for adequate formulation." *Id.* at 68.

This was shortly followed in *Rayonier, Inc.* v. *United States*, 352 U.S. 315:

> "We expressly decided in Indian Towing that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act *by resort to an alleged distinction*, imported from the law of municipal corporations, *between the Government's negligence when it acts in a proprietary capacity and its negligence when it acts in a uniquely governmental capacity.*" *Id.* at 319, emphasis supplied.

[18] Brief of Appellants, No. 742, Oct. Term 1967, pp. 46-50. The "finespun and capricious" (*Indian Towing, supra*, 350 U.S. at 168) nature of the distinction is shown by comparing the States' argument here and in *Maryland* v. *Wirtz* with that of the State in *United States* v. *California, supra*. Whereas here and in *Maryland* the States' position has been that State operation of schools and

Indeed, the entire part II of the *Maryland* opinion (id. at 193-199) is properly viewed as a refutation not only of the governmental-proprietary distinction but of the general argument (which that distinction attempts to verbalize) that some State activities are so vital to the State's sovereignty that they are beyond the scope of the commerce power even though they affect commerce. In short, *Maryland* v. *Wirtz* squarely holds that the operation of schools and hospitals by a State is an activity subject to Congressional regulation. Accordingly, it is, for purposes of *Parden*, "a departure by the State from a sphere that was exclusively its own." 377 U.S. at 196.

This brings us to the final point of difference relied on below:

> "(4) In *Parden*, the Federal [Employees Liability] Act had been in effect for some twenty years before the State commenced its railroad operation. In our present case, the State hospitals and training schools had been in existence and operation for many years before the enactment of the 1966 Amendment of the Fair Labor Standards Act. The State did not enter into any new form of activity subsequent to the enactment of the Amendment." (Pet. 12a)

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hospitals is "governmental" while State operation of railroads is proprietary," California had contended in the earlier case:

> "If it may be said that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, *in the exercise of its governmental function in facilitating the commerce of its principal port*, may exist only by leave of the federal government, and that the power lies with that government to prevent the State from discharging its sovereign functions for the general welfare of the people of California." Brief for Respondent, No. 33, Oct. Term 1935, p. 14 (Emphasis supplied).

When the same distinction of *Parden* was advanced by Utah in *Briggs* v. *Sagers*, 424 F.2d 130 (C.A. 10), cert. denied, 400 U.S. 829, it was carefully considered and decisively refuted. We therefore adopt as our own the Tenth Circuit's reasoning on this point:[19]

> "The question of whether Utah's continued participation in a sphere of authority subject to the constitutional power of the federal government amounted to consent, is one of federal law." * * *
>
> "We think the express intent of Congress and the language of *Parden* must control the matter. The regulatory power of Congress, although limited to constitutionally defined matters, e.g., interstate commerce, is plenary as to those matters. *Since the FLSA was enacted through the authority of the Commerce Clause, and inasmuch as the right of action imposed by the FLSA is fully within the congressional regulatory power, it would be incongruous to deny Congress the power to name a prompt, effective date for such amendments.* To suppress that corresponding power would run counter to the plenary nature of the constitutionally defined regulatory authority and could, in part, defeat the purpose of urgently required legislation. * * *
>
> "Although *Parden* does rely in part upon an intervening lapse of twenty years, it is not so crucial to the principles involved as to cause reversal absent that fact. Appellees' interpretation of the case implies that because there was a twenty year delay in commencing the interstate business, Alabama must have made a knowing and intelligent waiver. If that were true, we think the twenty year language would increase in significance.

[19] The prevailing opinion in the court below does not address itself to the Tenth Circuit's analysis in *Briggs* despite the reliance thereon by the original panel majority (Pet. 31a-32a) and by the dissenting judges on rehearing *en banc* (Pet. 23a).

However, the argument is unpersuasive in light of Alabama's contention that the State did not intend to waive its immunity or know that such a waiver would result. Furthermore, even the dissent in *Parden* did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting Justices understood the majority to hold that with regard to sovereign immunity, waiver of a constitutional privilege need be neither knowing nor intelligent. Under that rule, we think it sufficient that when Utah continued its operation of the institution, knowing of the passage of the 1966 Amendments, it waived its immunity to the remedies provided in the Act.

"When Congress constitutionally hinges the right of a State to engage in interstate commerce upon its amenability to a federal court suit by private parties, the States must decide *eo instante* whether to continue or withdraw." 424 F.2d at 133-134, emphasis supplied, footnotes omitted.

For these reasons, none of the four asserted distinctions of *Parden* has merit. That precedent conclusively establishes that Congress had constitutional power to subject respondent to § 16(b) of the FLSA in its operation of schools and hospitals.

CONCLUSION

The judgment below should be reversed and the case remanded to the District Court with directions to reinstate the complaint.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

Article I, Sec. 8 of the Constitution of the United States provides in pertinent part:

> The Congress shall have power * * * , To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

The Eleventh Amendment of the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or Subjects of any Foreign State.

The Fair Labor Standards Act of 1938 Ch. 676, 52 Stat. 1060 *et seq.* as amended, 29 U.S.C. §§ 201-219, provides in pertinent part:

> Sec. 3. As used in this Act—
>
> * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or Political subdivision of a State (except with respect to employees of a State or political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section * * *
>
> (e) "Employee" includes any individual employed by an employer, except that such term shall not, for the purposes of subsection (u) of this section include * * *
>
> * * * *
>
> (r) "Enterprise" means the related activities performed (either through unified operation or common

control) by any person or persons for a common business purpose * * * For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), * * * shall be deemed to be activities performed for a business purpose.

* * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce * * * and which—

* * * *

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children * * * (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

* * * *

Sec. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: * * *

Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

• • • •

Sec. 16.

(a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 of this Act in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

(c) * * * When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled * * *.

Sec. 17.

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.,
Petitioners,

vs.

DEPARTMENT OF PUBLIC HEALTH & WELFARE, STATE OF MISSOURI, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

We prefer the statement of the case which petitioners provide in their petition for a writ of certiorari. We set forth that statement as our statement in this case without quotation marks.

Petitioners are employees of five mental hospitals and a cancer hospital operated by the State of Missouri and employees of the state training school for girls operated under the Department of Corrections of the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision

over the state hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the United States District Court for the Western District of Missouri on August 4, 1969, to recover unpaid overtime compensation due them under §16(b) of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. §216(b). They also seek an equal amount as liquidated damages, as well as attorneys' fees, as provided in the statute.

The District Court in the instant case sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of a state against the state and as such is barred by the Eleventh Amendment and its principle of sovereign immunity.

A three-judge panel of the Court of Appeals, in a two to one decision, reversed the judgment of dismissal and held that Congress, by its passage of certain amendments in 1966, intended to authorize FLSA suits by citizen-employees against a state, and that the State of Missouri had waived its sovereign immunity to suit by continuing to operate its hospitals and schools after passage of the 1966 amendments extending coverage to employees of those institutions. It based its decision on *Maryland* v. *Wirtz*, 392 U.S. 183 in which this court upheld the validity of the 1966 FLSA amendments (but reserving the right-to-sue issue) and *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 which held that Congress, under its commerce clause power, could validly subject states to employee suits.

In a rehearing before the Eighth Circuit Court of Appeals *en banc*, that court, in a 5 to 4 decision, distinguished *Parden* and vacated the judgment of the three-judge panel. It thereby upheld the trial court's dismissal of the complaint by the state employees against the State of Missouri agencies.

ARGUMENT

I

Congress in Amending the Fair Labor Standards Act in 1966 Did Not Abrogate a State's Immunity from Suit by Private Individuals in the Federal Courts.

While the petitioners, plaintiffs below, have named various state institutions and their directors as defendants in this case, the federal courts have consistently taken the position that:

> ". . . the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. . . . And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. . . ." (*Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 464)

The petitioners seek to recover unpaid overtime compensation, an equal amount as liquidated damages, and attorneys' fees due to the alleged failure of the state institutions at which they were employed to pay overtime in the manner prescribed by the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. A judgment in the petitioners' favor could only be recovered from the state treasury. Therefore, it is obvious that in essence the petitioners' action is against the State of Missouri and Missouri is entitled to assert as a defense its immunity from suit.

In 1966 Congress amended the FLSA[1] to make the

1. Pub. L. 89-601, 80 Stat. 830.

wage and hour provisions of the Act applicable to state-operated schools and hospitals. *Maryland* v. *Wirtz*, 392 U.S. 183 upheld, as constitutional, the expansion of the Act to reach state-operated institutions. That decision, however, expressly reserved ruling on the question of whether a state could be sued by its employees for violation of the Act.[2] It is that reserved question which the instant case presents.

It is Missouri's position that Congress, in extending the provisions of the FLSA to Missouri schools and hospitals, did not override the state's immunity from suit in the federal courts; and, since Missouri has not consented to the present suit, the decision of the court below, affirming the district court's dismissal of the case for lack of jurisdiction, must be affirmed.

A. An Unconsenting State Is Immune from Suit in Federal Court.

In *Chisholm* v. *Georgia*, 2 Dall. 419 this court held that federal jurisdiction extended to suits by a citizen of one state against another state. Reaction to that decision was immediate. A resolution for an amendment to the Constitution to counteract the effect of the decision was introduced in Congress the day after the decision was handed down, and several states adopted resolutions bitterly denouncing the decision.[3] As a direct result of the decision in *Chisholm* v. *Georgia*, the Eleventh Amendment to the Constitution was submitted by Congress in the fall of 1795 to the states

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2. "... we decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions. They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. Questions of state immunity are therefore reserved for appropriate future cases." 392 U.S. at 200.

3. See, Warren, Charles, *The Supreme Court in the United States History*, Vol. I, 1924, pp. 93-104.

for ratification and it appears that ratification was forthcoming within a year after submission.[4]

In decisions since *Chisholm* v. *Georgia*, and the passage of the Eleventh Amendment, the federal courts have shown more deference to state immunity from suit. This immunity today rests, on a constitutional plateau with a broader foundation than merely the literal language of the Eleventh Amendment. In *Hans* v. *Louisiana*, 134 U.S. 1, the court went beyond the express language of the Eleventh Amendment by finding that a state was constitutionally immune from suit by its own citizens. In fact the *Hans* decision thoroughly repudiated the *Chisholm* holding. With respect to sovereign immunity, the majority opinion correctly observed:

> "... As pointed out in *Hans*, the Eleventh Amendment was the prompt response of Congress, the States and the people to the holding of a divided Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, that states were subject to suits by individuals. Supreme Court opinions handed down since Chisholm have repudiated the majority opinion in that case rejecting pre-Eleventh Amendment sovereign immunity on the part of the States. Thus in *Monaco* v. *Mississippi*, 292 U.S. 313, the Court denied the right of a foreign government to sue a State on the basis of sovereign immunity. No express State immunity from such a suit is found in the Constitution. The court quotes views expressed by Madison, Hamilton and Marshall and states:

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4. On February 18, 1793, the court handed down its opinion in *Chisholm* v. *Georgia*. Congress sent the Eleventh Amendment to the states for ratification on September 5, 1794. North Carolina was the last of the "three-fourths" of the states to ratify the Amendment. It did so on February 7, 1795. However, it was not until January 8, 1798, that President Adams in a message to Congress declared the adoption of the Eleventh Amendment.

> "There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."' 292 U.S. 313, 322-23.

The Court holds:

> "The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. *Ex parte State of New York, No. 1, supra*, p. 497; *Missouri v. Fiske*, 290 U.S. 18, 25, 26.
>
> '4. Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. . . .' 292 U.S. 313, 329-30."

As well established as the proposition that a state may not be sued in the federal courts by private citizens without consent of the state, is the proposition that a state may waive its immunity and consent to suits in the federal courts. See, i.e., *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 186. However, consideration of the factors that gave rise to the holdings that a state is protected from suits by private individuals, requires that consent to suit should not be lightly inferred. *Great Northern Ins. Co. v. Read*, 322 U.S. at 54.

There is no contention by the petitioners that Missouri has actively consented to this suit, but petitioners argue that Congress, by enacting the 1966 amendments to the FLSA, placed a duty on Missouri to waive its immunity from suit, or cease operation of institutions covered by the amendments. Missouri has not ceased operation of institutions so

covered. And, as we shall demonstrate, Congress has not required Missouri to waive its constitutional immunity from suit.

B. The Fair Labor Standards Act, As Amended, Contains No Language Which Would Subject a State to Suit by Private Individuals in the Federal Courts.

Petitioners state in their brief:

> "As a result of the 1966 amendments, the Fair Labor Standards Act expressly authorizes suits by employees against States to recover monetary compensation for violations of the Act. That authorization is granted in §16(b), which provides, in immediately pertinent part, as follows:
>
> 'Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction. . . .'" (Brief of Petitioners, p. 12)

However, a reading of the portion of §16(b), 29 U.S.C. §216(b), quoted in petitioners' brief, as well as the entire Act, reveals that the Act is entirely silent on the question of private persons suing a state. Further, the petitioners have cited no legislative history, and we know of none which indicates that Congress, in making the Act in 1966 applicable to certain state-operated institutions, gave even cursory consideration to the issue of whether states were to be subject to suits by private individuals under the Act.

In fact, §16(b) of the Act was not touched by the 1966 amendments; it reads today as it did before the time when

state employees were covered by the Act. Since §16(b) makes no reference to suits by employees against the state, application of the "old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect", *United States* v. *Mine Workers of America*, 330 U.S. 258, is called for in the instant case. In *Mine Workers, supra*, the court went on to observe:

> ". . . Congress was not ignorant of the rule . . . and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government in all cases." (330 U.S. 273)

Nor can Congress be deemed to be ignorant of the proposition that a state may not be sued in the federal courts by private individuals, and in failing to rewrite §16(b) to provide for suits against states, it must have intended that the state's immunity from suit would continued unimpaired.

Because a state's constitutional immunity from suit has a constitutional foundation, a state should not need an exemption in an act of Congress to preserve that immunity; such immunity, rather, should be found unless Congress expressly states that the state's immunity is not to prevail.

Conflicts between state sovereignty and federal preemption constantly result in friction between the federal government and states. To a certain extent the states' immunity from suit in the federal courts buffers this conflict. We do not dispute that Congress may conclude that in certain areas of commerce the states' immunity must give way to paramount federal objectives. However, when this is the decision of Congress, it should be the duty of Congress to clearly and unequivocally so state. To so hold removes responsibility for the creation of a state-federal conflict

from the courts, while fully recognizing the authority of Congress to legislate under the commerce clause. We believe it desirable from the point of view of both the states and the federal courts that the federal courts avoid entanglement in matters of state government, especially in a state's fiscal affairs, whenever possible. This case presents a case where the court may adopt a rule which would accomplish this objective.

C. Section 16(b) of the Fair Labor Standards Act (29 U.S.C. §216(b)) Expressly Recognizes a State's Constitutional Immunity from Suit by Private Individuals in the Federal Courts by Providing for Suits Only in Courts of "Competent Jurisdiction."

Section 16 (b), 29 U.S.C. §216(b), provides for suits by employees against employers for violations of the FLSA in courts of "competent jurisdiction." Section 16(b) makes no reference to the federal courts and no other provision of the Fair Labor Standards Act expressly authorizes suits by employees against employers in the federal courts. Section 16(b) is not a jurisdictional statute. Jurisdiction in the instant case is predicated on 28 U.S.C. 1337[5]. That section is basically the same as the general federal question jurisdiction statute, 28 U.S.C. 1331, with the exception that it eliminates a jurisdictional amount with respect to any civil action or proceeding arising under any act of Congress regulating commerce. The fact that a case arises under an act of the United States does not divest the state of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States. *Hans* v. *Louisiana*, 134 U.S. 1, 10. See also, *Duhne* v. *New Jersey*, 251 U.S. 311; *Smith* v. *Reeves*, 178 U.S. 436, 447-449; *Ex parte New York*, 256 U.S. 490, 497-498. Since §16(b) does not purport to

5. Paragraph 1 of the complaint in the District Court; appendix in the Court of Appeals, p. 2.

confer additional jurisdiction in the federal courts but restricts jurisdiction in suits by employees against employers to courts of "competent jurisdiction," it is apparent that Congress did not expand federal jurisdiction under the FLSA to reach suits against unconsenting states. In this regard, the present case may be contrasted to *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184, where the court held Federal Employers' Liability Act, 45 U.S.C. §51, et seq., permitted suit by a private individual against a state-operated railroad. Section 56 of the FELA expressly provided that an action may be brought "in a district court of the United States."

II

The Present Case May Be Distinguished from Parden v. Terminal Ry. Co., 377 U.S. 184.

We recognize both the majority and minority opinions in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 were of the view that Congress could condition a state's right to carry on activities in interstate commerce on a waiver of the state's right to assert its immunity from suit by private individuals in the federal courts. However, the present case may be distinguished from *Parden* on a number of fronts. As we have already stated, the FLSA is silent on federal jurisdiction, while the FELA, the Act at issue in *Parden*, expressly provides for actions in the federal courts.

In *Parden*, the court was presented with the issue of whether a state-operated railroad was subject to suit by an injured railroad employee pursuant to the FELA in the federal courts. The *Parden* decision in the words of Judge Friendly of the Second Circuit, ". . . was doubtless influenced by the fact that the state was engaging in activity, . . . which was generally performed by private persons or corporations, . . ." *Knight* v. *State of New York*, 443 F.2d

415, 418. For example, with respect to the Terminal Railway, the *Parden* majority observed:

> "The Terminal Railway is wholly owned and operated by the State of Alabama through its State Docks Department, and has been since 1927. Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit under statutory authority authorizing it to operate 'as though it were an ordinary common carrier.' 1940 Code of Alabama (recompiled 1958), Tit. 38, § 17. It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods in accordance with the Railway Labor Act, 45 USC § 151 et seq.; maintains its equipment in conformity with the Federal Safety Appliance Act, 45 USC § 1 et seq.; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce."

On the other hand state mental hospitals, a state cancer hospital, and a training school for delinquent girls, institutions involved in the present case, are institutions which the states have historically operated. They are neither operated for profit nor are they proprietary. While there may be some overlap between the functions performed by these state-operated institutions and institutions in the private sector, generally the state institutions operate in areas where alternatives from the private sector are not available. One of the purposes the doctrine of sovereign immunity promotes is to allow the state freedom and flexi-

bility in their fiscal affairs unfettered by judicial interference. Congress, though silent, may be presumed to intend to deny a state benefit of that doctrine when a state operates a railroad. But it does not follow that when a state confines itself to its traditional activities, that Congress, though it would have the power to regulate and, even to require waiver of immunity, would do so silently.

Another distinction between the FELA and the FLSA is that the purpose of the former was to facilitate suits by injured railroad employees to recover damages from their employer, while the object of the latter Act is to regulate wages and hours of work. The authority conferred on employees to sue employers under §16(b) of the FLSA is only incidental to the general purpose of the FLSA, but it is the heart of the FELA.

If the court had ruled in *Parden* that the Terminal Railway was not subject to suit, it would have deprived employees of that railroad of the opportunity to recover damages for injuries, the very opportunity that the FELA was designed to promote. On the other hand, were the court to hold that §16(b) of the FLSA did not authorize suits by employees of state-operated institutions against the state, there are other sections of the Act which assure that the Act will be enforced against the state. Section 16(c), authorizes the Secretary of Labor to file a suit on behalf of employees for unpaid overtime and §17, 29 U.S.C. §217, authorizes the Secretary to file equitable actions enjoining violation of the Act and to recover, restitution of past unpaid wages. Such suits are essential by suits brought by the United States. *Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 96; *Walling* v. *Frank Adam Electric Co.*, 163 F.2d 277, 283; and *Mitchell* v. *McCarty*, 239 F.2d 721, 724. Suits by the United States against the state are not prohibited by the Constitution. *United States* v. *Texas*,

143 U.S. 621; *United States* v. *Mississippi*, 380 U.S. 128, 140. The remedies of §17 are quite real as the case pending in the United States District Court for the Western District of Missouri, *Hodgson* v. *Missouri*, No. 19033-2 illustrates. In that suit partial summary judgment, (Appendix of this brief) holding the state liable, has been ordered, and the Secretary of Labor and the state have been ordered by the court to compute the amount of unpaid overtime and arrange for a method of payment.

An interesting aspect of §17 is that once such suit under the section is filed by the Secretary of Labor, §16 of the Act divests employees of their right to maintain a private action against their employer pursuant to §16(b). From the fact that Congress has expressly denied employees of a right to maintain an action under §16(b) once the Secretary of Labor has brought suit under §17, it is apparent that private enforcement is not a paramount objective of the Act. With Congress providing certain situations where private employees are deprived of a right of action, it follows that the intent of Congress would not be frustrated by construing the Act to hold that Congress did not intend to require a state to waive its immunity from suit.

There is sound reason why Missouri prefers to limit actions under the FLSA to suits brought by the federal government. In such cases Missouri's liability is at most the amount of unpaid wages owing under the Act. However, if private employees can maintain suits under §16(b) against the state, Missouri faces the possibility of a judgment for the amount of unpaid wages owing under the Act, an equal amount as liquidated damages and attorneys' fees. It is one thing for a court to find, as was done in *Purden*, that an injured employee is entitled to maintain an action against the state for damages to be made whole,

it is quite another to hold that Congress not only intended that an injured employee be permitted to sue a state to be made whole but that he could recover double. The fact double recovery is authorized by §16(b), we believe negates any intent on the part of Congress to make that section applicable to the states.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, this court found that the congressional policy of uniformity, denial of competitive damages to malevolent employers and public policy preclude employers from securing from employees waiver of the liquidated damages, equal to the amount of the unpaid wages, authorized by §16(b). The position of a sovereign state is beyond that of a private employer and the considerations that called for full enforcement of the remedies authorized by §16(b), in the private sector do not easily transfer to the public sector. Can it be presumed from congressional silence that Congress intended that a state is to give priority to payment of double damages to employees of mental hospitals rather than other necessary and compelling public expenditures such as the care and treatment of patients in those hospitals? One of the purposes the doctrine of sovereign immunity serves is to allow a state to determine the priority to be given the expenditure of public funds. A mandatory obligation to pay double damages and the expenses of litigation is so foreign to the concept of sovereign immunity as to negate any silent intention on the part of Congress to subject the states to private actions under §16(b).

It is not necessary to overrule *Parden;* but that decision should be limited to actions brought under the FELA. We do not believe that even the majority in *Parden* contemplated that every act of Congress which permits private recovery authorizes recovery against the state on the theory of waiver. Yet, if the *Parden* waiver doctrine were applied

to the FLSA, it would follow that the doctrine would apply to all acts of Congress authorizing private recovery. States could be sued for copyright infringement, cf. *Wihtol* v. *Crow*, 309 F.2d 777, 781; or, patent infringement, cf. *Hercules, Inc.* v. *Minnesota State Highway Dept.*, 337 F.Supp. 795; or on scores of other federally created actions. This would stretch the waiver doctrine to the breaking point.

CONCLUSION

For the foregoing reasons, a decision of the court below should be affirmed.

Respectfully submitted,

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